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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

PRINCE GEORGE'S COUNTY, MARYLAND,
Petitioner,

v.

11126 BALTIMORE BOULEVARD, INC.
t/a WARWICK BOOKS
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment require that a county zoning ordinance that regulates adult bookstores provide for "prompt judicial review", and if so does it require prompt access to the Courts or prompt completion of review by the courts?

2. Does the First Amendment require that a county zoning ordinance that regulates adult bookstores provide specific and reasonable time limits on the administrative process, and if so, is five months unreasonably long to decide whether to grant a zoning approval of unlimited duration?

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PRINCE GEORGE'S COUNTY, MARYLAND,
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v.

11126 BALTIMORE BOULEVARD, INC.
t/a WARWICK BOOKS
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Prince George's County, Maryland ("the County") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit en banc is reported at 58 F.3d 988. The panel decision of that court, which was vacated, is reported at 32 F.3d 109. The opinion of the United States District Court for the District of Maryland is reported at 828 F.Supp. 370.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on July 5, 1995. The jurisdiction of the Supreme Court to review that judgment by writ of certiorari is conferred in 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that:

> Congress shall make no law. . .abridging the freedom of speech, or of the press;

U.S. Const., amend. I. This provision is made applicable to the states through the Fourteenth Amendment.

The Prince George's County Code provision involved here Subtitle 27, part 16 are set forth in the appendix.

STATEMENT OF THE CASE

This case involves the latest chapter in Respondent's eight-year litigation effort to have the County's adult bookstore zoning ordinance declared unconstitutional. It follows a previous suit, *11126 Baltimore Boulevard v. Prince George's County*, 684 F.Supp. 884 (D.Md. 1988), *rev'd*, 886

F.2d 1415 (4th Cir. 1989), *vacated and remanded*, 496 U.S. 901 (1990), *dismissed as moot*, 924 F.2d 557 (4th Cir. 1991).

The instant suit was filed on December 26, 1991, and briefly stayed. Cross-motions for summary judgment were filed by the parties, and on July 22, 1993, the district court granted the County's motion, holding the ordinance to be constitutional and entering judgment in favor of the County. *11126 Baltimore Boulevard v. Prince George's County*, 828 F.Supp. 370 (D.Md. 1993). Respondent noted its appeal, and on August 12, 1994, a panel of the United States Court of Appeals for the Fourth Circuit reversed the district court decision and struck down the ordinance. *11126 Baltimore Boulevard v. Prince George's County*, 32 F.3d 109 (4th Cir. 1994). Upon a petition for rehearing and suggestion for rehearing *en banc*, that panel decision was vacated on November 2, 1994. The court ordered supplemental briefing and noted it's particular interest in "what is required to meet

the requirement that 'expeditious judicial review' . . . must be available'." On July 5, 1995, the Court of Appeals, en banc, issued its decision reversing the judgment of the district court, by a vote of eleven to three. The majority found that "the ordinance imposes an unconstitutional prior restraint on speech because it fails to provide for adequate procedural safeguards," 58 F.3d at 991, with regard to the duration of both the administrative review and the subsequent judicial review. The dissent found that the constitution was satisfied by the availability of access to the courts and that in any event, the Maryland Rules provide for prompt judicial decisions.

The County first enacted zoning regulations governing adult bookstores in 1975, with several subsequent modifications. 684 F. Supp. at 886-88. In 1986, Respondent filed suit in the district court seeking declaratory and injunctive relief pursuant to 42 U.S.C. §1983, contending that

the regulations violated the First and Fifth Amendments. After extensive submissions by the parties, the district court examined at length the Respondent's claims.

First, the district court found that "the ordinance in this case is a content-neutral time, place and manner regulations." 684 F. Supp at 891. This finding was affirmed on appeal by the Fourth Circuit. 886 F.2d at 1420. Such a regulation is valid if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, (1986).

Since mitigation of the negative secondary effects associated with adult entertainment business is a valid governmental interest, *Renton* at 48, the district court then looked at the evidence of such secondary effects, including

> a stack of reports and studies regarding adult bookstores zoning regulations and an affidavit from a professional land use planner supporting the rationality of the Council's

enactment of its adult bookstore ordinances.

684 F.Supp. at 896. The district court concluded that

> had the Council received those materials prior to its vote on the ordinances, its actions would appear to fall within the standards of [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d (1968)] and *Renton*. But post-hoc ationalizations - materials apparently collected for use in this case and not presented to the Council before it enacted the challenge legislation - are something quite different.

684 F.Supp. at 896. The Fourth Circuit reversed this portion of the district court decision, holding

> that the County's legislative records show substantial and legitimate legislative interests which the County reasonably believed to be relevant to the problem it sought to address . . . In light of this record, coupled with the reasonable exercise of legislative notice and supplemental evidence presented to the trial court, we hold that the County sufficiently demonstrated substantial governmental interests in its regulations.

886 F.2d at 1425. The Fourth Circuit further concluded that "the regulations are both narrowly tailored to serve the interests advances by the County and they afford ample

alternative avenues of communications" and therefore are constitutional. 886 F.2d at 1426.

The district court also found fault with the criteria established for issuance of adult bookstore special exceptions, holding that they were vague and "subject to possible manipulation and arbitrary application by officials who might object to the contents of the materials sold at adult bookstores." 684 F.Supp. at 899. Again, the Fourth Circuit disagreed, finding that the ordinance provisions "provide definite guidelines, consistent with the substantial and legitimate interests advances by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit." 886 F.2d at 1427.

In sum, the district court found only two constitutional defects in the ordinance: the lack of sufficient evidence in the legislative record to support the County's

interest in eradicating the negative secondary effects of adult bookstores; and the vague criteria for granting special exceptions for such bookstores. 684 F.Supp. at 899. The Fourth Circuit reversed on both these points and upheld the entire ordinance as constitutional. 886 F.2d 1415-29.

After its petition for rehearing and rehearing *en banc* was denied by the Fourth Circuit, *Id.*, Respondent petitioned the Supreme Court for a writ of certiorari. Subsequent to the Fourth Circuit decision but prior to the petition for certiorari, the Supreme Court had issued a new ruling in *FW/PBS, Inc. dba Paris Adult Bookstore, II v. City of Dallas*, 493 U.S. 215, (1990). The Supreme Court thus vacated the Fourth Circuit decision and remanded the case "for further consideration in light of *FW/PBS*." 493 U.S. 901, 110 S.Ct. 2580. After rebriefing and reargument, the Fourth Circuit found the case to be moot in light of subsequent amendments to the ordinance, dismissed the appeal, and remanded the case to

the district court with instructions to dismiss the action. 924 F.2d 557. The district court dismissed the case by Order dated May 14, 1991.

The present case challenges the ordinance in its present form, that is, the ordinance as examined in the previous litigation with amendments made by CB-131-1988 and CB-6-1992.

The sole issue argued by Respondent below is whether the ordinance requires sufficiently prompt administrative and judicial action. As succinctly summarized by the district court, the ordinance

> included time limitations within which the various stages of the special exception application process were to be completed. Under these limitations, the County's Zoning Division is required to decide whether to accept an application within three working days of receipt of a "completely and properly filled out" application. Posting is to take place within fifteen days of the date of the Zoning Division's acceptance of such an application; the issuance of the Zoning Division's written report and scheduling of a public hearing,

> within 45 days thereto; the hearing concluded and the decision of the Zoning Hearing Examiner filed, within 90 days thereof; notice of appeal to the District Council filed within 105 days thereof; oral argument before the District Council, within 135 days thereof; and a decision on the appeal by the District Council, within 150 days thereof. If the District Council fails to make its decision within that 150 day period, the application is deemed to have been denied. It is also noted that under the County's general zoning ordinance applicable to all zoning including that pertaining to adult bookstores, the District Council may remand zoning matters for further proceedings before the Zoning Hearing Examiner.

828 F.Supp. at 373. The ordinance itself contains no provision regarding judicial review. However, the Maryland Rules of Procedure provide for such review, and an Administrative Order of the Circuit Court for Prince George's County provides for a judicial decision within ten days after the filing of briefs.

REASONS FOR ALLOWANCE OF THE WRIT

A writ of *certiorari* should be allowed so that this

Court can resolve important issues regarding the application of *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). That case, which was itself a plurality decision of a severely fractured Court, has caused clear and direct conflicts among several federal circuits. Granting *certiorari* would allow this Court to clarify its prior ruling and give guidance to the lower courts on this issue. Such guidance is important since confusion over *FW/PBS* has consumed precious judicial resources throughout the country and has hampered local governments in their effort to protect their substantial government interests without running afoul of the First Amendment.

In applying procedural requirements to the County's zoning ordinance, the Fourth Circuit extended the holding of *FW/PBS* to an unprecedented extent, and in so doing conflicted with decisions of this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, (1986) and *Young v. American*

Mini Theatres, Inc., 427 U.S. 50 (1976). Both *Renton* and *Young* involved constitutional challenges to zoning ordinances which imposed "time, place and manner restrictions" on sexually oriented expressive activity, and this Court held that such ordinances are valid if they are content neutral, designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication. *Renton* at 47. That has been the constitutional standard applied to zoning ordinances ever since, and the County ordinance had previously been upheld under this standard. 886 F.2d 1415.

FW/PBS examined, not a zoning ordinance, but a licensing scheme which required governmental approval before an adult business could operate in the City of Dallas. Due to the unique nature of a licensing scheme, a plurality of this Court held that the First Amendment required two procedural safeguards: (1) a specified brief period for

administrative decision making; and (2) availability of prompt judicial review of a license denial. *FW/PBS* at 228-30.[1] Ignoring the clear directive that the need for procedural safeguards varies with the type of regulation, *Id.* at 229-30, *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971), the Fourth Circuit mechanically applied the safeguards appropriate for licensing schemes to the County zoning ordinance. 58 F.3d at 996-1001. This directly conflicts with the *Renton*[2] and *Young* decisions of this Court.

1/ This Court split evenly as to what procedural safeguards, if any, should apply to a licensing scheme. Three justices (O'Connor, Stevens and Kennedy) found these two safeguards to be necessary, *FW/PBS* at 225-30; three justices (Brennan, Marshall and Blackman) would have required a third safeguard *Id.* at 238-42; and three justices (White, Rehnquist and Scalia) would not have imposed any such safeguard requirement. *Id.* at 244-64.

2/ The Fourth Circuit attempts to distinguish *Renton*, claiming that the County ordinance sub judice "prohibits adult bookstores from operating anywhere within the County until permission in the form of a special exception has been granted. In *Renton* no such permission was required." 58

See, FW/PBS at 244-49 (concurrence of Justice White and Chief Justice Rehnquist).[3] This alone justifies issuance of the writ.

Moreover, in applying the *FW/PBS* procedural requirement, the Fourth Circuit went further awry. As to the

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F.3d at 995. However, this ignores that fact that a bookstore is not considered to be an "adult bookstore" until it at least ten percent of its stock involves sexual material. County Code §27-902(b). Thus, a bookstore may operate without any approvals, regulations or restraints until its stock reaches the threshold level.

3/ The Fourth Circuit decision also conflicts with opinions at the Seventh Circuit in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Circuit 1993) (en banc) (concurrence of Judge Flaum at 1332-33; judicial review not required for schemes "that only ask and allow administrators to make the kind of determination for which they are especially suited; e.g., questions about city aesthetics, traffic flow or City Code violations"); (concurrence of Judge Ripple at 1334-35; where statutory criteria restrain discretion of official procedural safeguards unnecessary); and (dissent of Judge Cummings at 1338-39; "A licensing scheme that originates as a prior restraint, as opposed to a zoning ordinance, is subject to more intense scrutiny than time, place and manner analysis; the regulation must also provide adequate procedural safeguards to prevent city officials from abusing their discretion").

first requirement, a specified brief period for administrative decision making, the Fourth Circuit held that "we cannot say that the 150 day time period for decision imposed by the County satisfies this standard." 58 F.3d at 998. Yet the same court had earlier ruled that a six month review process was not unreasonably long. *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland,* 886 F.2d 1415, 1428 (4th Cir. 1989) ("the diligent exercise of due process takes time, and we find the time limits generally followed by the County to be reasonable for careful review in this sensitive area of the law"). As the district court noted, "if six months is reasonable, then five months must be also." *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland,* 838 F. Supp. 370, 374 (D.Md. 1993). The Fourth Circuit did not explain this sudden change in view and implicitly faulted the County and the lower court for not anticipating such appellate vicissitudes by noting that "the record is devoid of

any evidence that would support the necessity of a 150 day delay. . ." 53 F.3d at 998. Of course, the record relied on by the County and the district court was the earlier finding that six months was reasonable, and the subsequent ruling transformed considered legal analysis into nothing more than an intellectual shell-game. In this respect, the Fourth Circuit has "so far departed from the accepted and usual course of judicial proceedings. . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a).

Likewise, as to the second procedural requirement, availability of prompt judicial review, the Fourth Circuit rendered a decision in conflict with decisions of the First, Fifth and Seventh Circuits. The plurality of this Court held that this requirement means "that there must be the possibility of prompt judicial review in the event that the license is erroneously denied" and that an ordinance must "provide an avenue for prompt judicial review. . ." *FW/PBS*

at 277 (emphasis added). The Fourth Circuit interpreted these statements to mean a prompt "judicial ruling" or "judicial decision." 58 F.3d at 1001. In a companion case, it further elaborated that "prompt judicial review means a sufficiently prompt decision on the merits." *Chesapeake B & M, Inc. v. Harford County, Maryland*, 58 F.3d 1005, 1012 (4th Cir. 1995).

This interpretation is in clear and direct conflict with decisions of *Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc) (holding that availability of state's common law procedure for seeking a writ of certiorari in court to review an administrative agency decision regarding the licensing of sidewalk newsstands is sufficient to meet the *FW/PBS* "prompt judicial review" requirement); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994)(holding that *FW/PBS's* requirement of "prompt judicial review" is satisfied by "access [to] the courts within a brief period," i.e.,

by giving the aggrieved party 30 days to appeal to court); *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068, 1070 (5th Cir. 1994)("We have interpreted [*FW/PBS's* "prompt judicial review"] language to require only access to the courts within a specified brief period"); *Jews for Jesus v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1327 (1st Cir. 1993)(applying *FW/PBS's* standard to regulations of expressive activity in subway station, and holding that "prompt judicial review" is provided where applicant denied license may appeal denial in court and is granted a hearing).

The Fourth Circuit recognized that "the circuits are split on this question" and sought support for its interpretation from the Sixth Circuit decision of *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995)[4]. That split among the circuits also justifies granting

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4/ A petition for writ of certiorari in *East Brooks Books* is

the writ in this case, and the circuits clearly seek guidance from the Supreme Court on this issue. *See, 11126 Baltimore Blvd. v. Prince George's County*, 58 F.3d at 1001 ("The questions presented are difficult, and there is little authority to guide our decision"); *Graff* at 1333 ("this case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States"); and *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994)("The [Supreme] Court, however, has not clarified exactly what type of judicial review is sufficient to fulfill this requirement...").

In addition, the interpretation adopted by the Fourth Circuit raises important questions of federal law that should be settled by this Court. As noted above, this Court has long recognized that "there is a substantial governmental interest

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now pending before this Court. (No. 95-203), as is a petition, in *Harford County v. Chesapeake B & M, Inc., supra*.

in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them..." *FW/PBS* at 244, 110 S.Ct. at 615 (concurrence). Yet this interest is virtually impossible to protect if every relied regulation requires control over the time in which the judiciary conducts an independent review of regulatory decisions. In essence, the Fourth Circuit has directed that a local legislature may pursue this substantial government interest only by violating the traditional separation of powers. 16 Am.Jur.2d Const. Law §331, n.100. That direction is obviously wrong and needs to be addressed by this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be allowed.

Respectfully submitted,

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APPENDIX A

11126 BALTIMORE BOULEVARD, INCORPORATED, t/a Warwick Books,

Plaintiff-Appellant,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, Defendant-Appellee.

No. 93-2151.
United States Court of Appeals,
Fourth Circuit.
Argued March 7, 1995.
Decided July 5, 1995.

OPINION

WILKINS, Circuit Judge:

11126 Baltimore Boulevard, Incorporated, t/a Warwick Books, brought this action pursuant to 42 U.S.C.A. Sec. 1983 (West 1994), claiming that the Prince George's County, Maryland adult bookstore ordinance, Prince George's County, Md., Code subtit. 27, part 16, violates the First and Fourteenth Amendments of the United States Constitution. The district court granted summary judgment in favor of the County. Warwick Books appeals, contending that the ordinance imposes an unconstitutional prior restraint on speech because it fails to provide for adequate procedural safeguards. We agree and reverse the judgment of the district court.

Appendix A

I.

In May 1986, Warwick Books filed an action in the United States District Court for the District of Maryland, maintaining that the Prince George's County adult bookstore ordinance in effect at that time violated the First and Fourteenth Amendments. Although the district court concluded that the ordinance constituted a content-neutral time, place, and manner restriction, it found the ordinance unconstitutional as applied to adult bookstores because the interest advanced by the County was not sufficiently supported by evidence in the legislative record and because the standards to be applied in determining whether a special exception should be granted were vague and subject to arbitrary manipulation. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 684 F.Supp. 884, 891, 899 (D. Md.1988). This court reversed the decision of the district court, concluding that the ordinance constituted a content-neutral time, place, and manner restriction which was narrowly tailored to serve the interest of Prince George's County in minimizing the secondary effects associated with, and the protection of children from, adult bookstores and that it provided for ample other opportunities for speech. 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415, 1420, 1426 (4th Cir.1989). Additionally, we determined that the adult bookstore ordinance "provide[d] definite guidelines, consistent with the substantial and legitimate interests advanced by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit." Id. at 1427. Although not all of the steps in the process leading to a

decision on an application for a special exception were bound by precise time limitations, we noted that the length of the process necessary to obtain a special exception did not render the ordinance an unconstitutional prior restraint because the uncontradicted evidence submitted by County officials indicated that the application process normally took approximately six months. Id. at 1428 n.8. We also observed that adult bookstores were generally permitted to continue operation while the exception was sought. Id.

Thereafter, the Supreme Court rendered its decision in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), holding that a Dallas business licensing scheme constituted an unconstitutional prior restraint on protected speech because it failed to impose adequate procedural safeguards to ensure a prompt decision on a license application and prompt judicial review of a denial. The Court granted Warwick Books' petition for a writ of certiorari, vacated our decision in 11126 Baltimore Boulevard, and remanded for reconsideration in light of FW/PBS. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990). On remand, we learned that the County had amended its adult bookstore ordinance to remedy the deficiencies identified in the prior district court decision. 11126 Baltimore Blvd. v. Prince George's County, Md., 924 F.2d 557 (4th Cir.) (per curiam), cert. denied, 502 U.S. 819, 112 S.Ct. 76, 116 L.Ed.2d 50 (1991). And, although the County asserted that it intended to return to its prior zoning ordinance if this court upheld the constitutionality of the prior ordinance, we concluded that the County was seeking an ***992** advisory opinion and dismissed the appeal. Id.

Appendix A

Following our dismissal, the County further amended its adult bookstore ordinance. As presently codified, the ordinance prohibits adult bookstores (FN1) from operating anywhere in the County unless they obtain a special exception and adhere to other requirements imposed by the ordinance. (FN2) Prince George's County, Md., Code Sec. 27-903. To obtain a special exception, adult bookstores must file an application. In reviewing the application, the ordinance requires that the District Council for Prince George's County consider a number of factors bearing on the suitability of the proposed site for an adult bookstore. (FN3) Id. Sec. 27-904(b). In addition, the ordinance requires that the administrative review procedure be concluded and that the District Council render its decision on the application for a special exception within 150 days after the acceptance of a complete application. Id. Sec. 27-904.01. If the District Council fails to render a decision within 150 days, the application is deemed denied. Id. Sec. 27-904.01(i). (FN4) Although the ordinance itself contains no provision for judicial review, the parties agree that Maryland law provides for judicial review of final administrative decisions. See Md. Ann.Code art. 66B, Sec. 4.08 (Michie 1988 & Supp.1994). Under Maryland procedural rules, an adult bookstore seeking review of *993 an administrative denial of a special exception would face a delay of up to 93 days before briefing could be concluded, assuming that the bookstore could complete each of the steps in the process with which it is charged within one day. (FN5) The administrative judge of the Circuit Court for Prince George's County issued an administrative order providing that an appeal from an administrative decision relating to the Prince George's County adult bookstore ordinance is to be assigned

to a specific judge, who shall schedule oral argument no later than five days after the day for filing a reply brief under the Maryland Rules and shall thereafter render a decision within five days after the conclusion of oral argument. In re B-Rule Appeals in Adult Bookstore Cases, Misc. No. ___ (Cir. Ct. Prince George's County, Md. March 19, 1993). Any extension of these judicially-imposed time limitations may not be granted except by consent of the parties. Id.

Warwick Books' instant action presents a facial challenge to the constitutionality of the amended ordinance. See FW/PBS, 493 U.S. at 223-24, 110 S.Ct. at 603-04. The parties agreed before the district court that there were no material factual disputes and that the sole issue presented for decision was whether the ordinance imposed sufficient procedural safeguards on administrative and judicial review to avoid being an unconstitutional prior restraint. (FN6) On cross motions for summary judgment, the district court entered judgment for the County. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 828 F.Supp. 370 (D. Md.1993). It noted that this court had previously ruled that the six-month estimate for processing special exceptions was not unreasonable and concluded that "if six months is reasonable, then five months must be also." Id. at 374. Moreover, the district court found no constitutional deficiency with the promptness of judicial review. Id. at 376. Warwick Books appeals this decision, claiming that the ordinance constitutes an unconstitutional prior restraint on speech because it does not provide for adequate procedural safeguards. (FN7)

II.

[1][2][3][4][5] Although neither party contests the issue, we initially consider whether Warwick Books may pursue a facial challenge to the ordinance based on its claim that the ordinance is an unconstitutional prior restraint ***994** on speech protected by the First Amendment. (FN8) It is well settled "that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771 (1988). Permitting government officials unbridled discretion in determining whether to allow protected speech presents an unacceptable risk of both indefinitely suppressing and chilling protected speech. See FW/PBS, 493 U.S. at 227, 110 S.Ct. at 605; Freedman v. Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965). Without the constraint of specific standards to guide the decisionmaker in judging whether a license should issue, an impermissible danger exists that a government official may decide to exercise his judgment to suppress speech he personally finds distasteful or that an applicant may feel compelled to censor his own speech. See Lakewood, 486 U.S. at 757-58, 108 S.Ct. at 2144-45; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 1243, 43 L.Ed.2d 448 (1975). And, without procedural safeguards to ensure a prompt resolution, an applicant may conclude that seeking a determination is too burdensome a task to pursue, impermissibly chilling the exercise of protected speech. See Freedman, 380 U.S. at 59, 85 S.Ct. at 739. "[T]hese evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge." Lakewood, 486 U.S. at 757,

108 S.Ct. at 2144; see also FW/PBS, 493 U.S. at 223-24, 110 S.Ct. at 603-04 (failure to place time limitations on decisionmaker "is a species of unbridled discretion" warranting permission to bring a facial challenge). Accordingly, when these risks are threatened to a significant degree by state regulation, courts must permit those subject to the laws to bring an immediate facial challenge. Lakewood, 486 U.S. at 759, 108 S.Ct. at 2145.

[6] We conclude that the Prince George's County adult bookstore ordinance bears a close enough relationship to, and engenders a sufficient risk of suppression of, protected expression to permit Warwick Books to bring a facial challenge to the ordinance. There can be little question that the ordinance is focused directly at the placement of bookstores selling non-obscene adult materials that are engaged in conduct protected by the First Amendment, see FW/PBS, 493 U.S. at 224, 110 S.Ct. at 603; Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959), and could be used effectively as an avenue for censorship, cf. Lakewood, 486 U.S. at 761, 108 S.Ct. at 2146 (comparing scheme regulating the placement of newsracks with the requirement of obtaining a building permit). Nor can it be doubted that a scheme establishing a prior restraint on protected speech that places unbridled discretion in the decisionmaker by failing to impose either objective standards for decision or adequate procedural safeguards creates an impermissible risk of suppression with every application. See FW/PBS, 493 U.S. at 223-24, 110 S.Ct. at 603-04.

III.

Appendix A

[7] The County initially disputes that the Prince George's County adult bookstore ordinance is a licensing scheme and contends that the procedural safeguards identified in Freedman--and applied to invalidate the sexually oriented business licensing scheme in FW/PBS--need not be satisfied. Instead, the County argues that the adult bookstore ordinance is merely a zoning ordinance designed to control or eliminate the secondary effects of adult bookstores and, accordingly, that the time, place, and manner analysis applied in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), is the only inquiry that must be conducted. Thus, the County contends that it could constitutionally provide a time frame of 150 months, rather than 150 days, in which to act on an application by a bookstore for a special exception, or indeed, ***995** that it could specify no time frame at all for decision.

In Renton, the Supreme Court considered a constitutional challenge to a city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of residential zones, single or multiple family dwellings, churches, parks, or schools. The Court held that because the ordinance was a zoning measure designed to combat the undesirable secondary effects of businesses purveying sexually explicit material, it was to be reviewed under the standards applicable to content-neutral time, place, and manner regulations. Renton, 475 U.S. at 49, 106 S.Ct. at 929.

There is no question that the government may appropriately regulate the time, place, and manner of

protected speech or that the Prince George's County adult bookstore ordinance is subject to review under the standards applicable to such review. Further, it is undoubtedly true that if Prince George's County had structured its zoning ordinance like the one reviewed in Renton, no additional analysis of whether the ordinance constituted an unconstitutional prior restraint on protected speech would be required. However, the Prince George's County adult bookstore ordinance is different from the zoning ordinance reviewed in Renton because it prohibits adult bookstores from operating anywhere within the County until permission in the form of a special exception has been granted. In Renton no such permission was required, with the result that those wishing to engage in protected speech were immediately free to do so anywhere within the city that met the zoning restrictions imposed by the city ordinance. (FN9) Thus, the Renton Court was not called upon to consider whether a zoning ordinance that is structured in a way that prohibits protected speech until permission is granted must be analyzed as a prior restraint. (FN10) Following the decision in Renton, the Court has made clear that otherwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the Freedman procedural safeguards. (FN11) See FW/PBS, 493 U.S. at 227-28, 110 S.Ct. at 605-06; see also J.L. Thomas, Inc. v. County of Los Angeles, 232 Cal.App.3d 916, 283 Cal.Rptr. 815, 820 (1991) (holding zoning ordinance requiring sexually oriented businesses to obtain a conditional use permit was a prior restraint; lack of procedural safeguards rendered ordinance

unconstitutional); cf. Marty's Adult World of Enfield, Inc. v. Town of Enfield, Conn., 20 F.3d 512, 515 (2d Cir.1994) (holding zoning special use permit required for all changes in use from retail to entertainment regardless of content of the entertainment did not constitute a licensing scheme amounting to prior restraint because it did not single out business based on content of speech and permitted business to operate elsewhere without obtaining permit). In FW/PBS, the Court applied prior restraint ***996** analysis to a Dallas licensing scheme for sexually oriented businesses, regardless of the fact that among the standards imposed upon individuals seeking a license to operate such an establishment was a requirement that the business location comply with applicable zoning restrictions. FW/PBS, 493 U.S. at 225-30, 238-42, 110 S.Ct. at 604-07, 611-14; see Dumas v. City of Dallas, 648 F.Supp. 1061, 1078-89 (N.D.Tex.1986) (setting forth ordinance), aff'd sub nom. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir.1988), aff'd in part, vacated in part, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Importantly, in concluding that prior restraint analysis must be applied, the FW/PBS Court necessarily rejected the position advanced by Justice White, and joined by Chief Justice Rehnquist, that because the Dallas licensing scheme constituted a content-neutral time, place, and manner restriction directed at the secondary effects of adult bookstores, the Freedman procedural safeguards were inapplicable. FW/PBS, 493 U.S. at 244-49, 110 S.Ct. at 614-17 (White, J., concurring in part and dissenting in part). Accordingly, we reject the County's argument that because its adult bookstore ordinance is merely a content-neutral time, place, and manner zoning restriction directed at the secondary effects of such

establishments, it is not subject to prior restraint analysis. Having concluded that the ordinance is properly analyzed as a prior restraint, we turn to consider Warwick Books' argument that the ordinance cannot pass constitutional muster when so analyzed.

IV.

[8][9] The guarantee of freedom of speech afforded by the First Amendment is abridged whenever the government makes enjoyment of protected speech contingent upon obtaining permission from government officials to engage in its exercise under circumstances that permit government officials unfettered discretion to grant or deny the permission. See FW/PBS, 493 U.S. at 223-27, 110 S.Ct. at 603-06. Such discretion exists when a regulation creating a prior restraint on speech fails to impose adequate standards for officials to apply in rendering a decision to grant or deny permission or when a regulation fails to impose procedural safeguards to ensure a sufficiently prompt decision. Id.

[10] With respect to procedural safeguards, the Supreme Court identified in Freedman the following three requirements necessary to guarantee that a decision is rendered promptly:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear

the burden of proof once in court.

Id. at 227, 110 S.Ct. at 606 (citing Freedman, 380 U.S. at 58-60, 85 S.Ct. at 738-40).

Warwick Books asserts that the Prince George's County adult bookstore ordinance fails to provide adequate procedural safeguards--and thus is an unconstitutional prior restraint on speech--because the 150-day time period imposed for a decision prior to judicial review is not a "specified brief period" and because prompt judicial review of a denial of a special exception application is unavailable. (FN12) We address these contentions in turn.

***997**

A.

[11] A prior restraint on speech that imposes no time limitations on the decision-making process plainly fails to satisfy the first requirement set forth in Freedman. See, e.g., FW/PBS, 493 U.S. at 229, 110 S.Ct. at 606; Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 802, 108 S.Ct. 2667, 2680, 101 L.Ed.2d 669 (1988); Vance v. Universal Amusement Co., 445 U.S. 308, 316-17, 100 S.Ct. 1156, 1161-62, 63 L.Ed.2d 413 (1980) (per curiam). However, no clear guideposts mark our way in determining whether the 150-day time period for decision established in the Prince George's County adult bookstore ordinance constitutes a "specified brief period."

In Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-42, 88 S.Ct. 754, 755-56, 19 L.Ed.2d 966 (1968) (per curiam), the Court summarily held that a period of 50 to 57

days for obtaining an administrative decision did not amount to a "specified brief period" in the film censorship context. Warwick Books asserts that Teitel Film Corp. should be read to establish a bright-line rule that a 50-day period for an administrative decision necessarily fails to meet the standard set forth in the first Freedman requirement. We cannot agree.

[12][13][14] "The core policy underlying Freedman is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." FW/PBS, 493 U.S. at 228, 110 S.Ct. at 606 (emphasis added). The reasonableness of the time period during which a restraint on speech may operate prior to judicial review "may vary in different contexts." United States v. Thirty-Seven Photographs, 402 U.S. 363, 374, 91 S.Ct. 1400, 1407, 28 L.Ed.2d 822 (1971); see TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705, 708 (5th Cir.1994). Thus, a determination of the reasonableness of the time period during which the restraint on speech may constitutionally operate requires an examination of the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint. (FN13) See TK's Video, 24 F.3d at 708.

[15] We apply these factors in resolving whether the 150-day time period for decision imposed by the Prince George's County adult bookstore ordinance is a reasonably brief time period. Although zoning decisions necessarily involve a detailed examination of numerous factors, we are unable to conclude that 150 days is a reasonably brief time

frame within which to render a decision. The ordinance is designed to ameliorate the adverse secondary effects of adult bookstores and to prevent exposure and access by children to such establishments by imposing time, place, and manner restrictions on the operation of adult bookstores. See Prince George's County, Md., Code Sec. 27-901(b). Comparison of schemes devised and time limitations imposed by other jurisdictions to remedy the perceived evils occasioned by adult bookstores discloses that the necessary inquiries may be performed in a shorter time frame than that imposed by Prince George's County. See TK's Video, 24 F.3d at 708 (upholding 60-day period for acting on licensing ***998** application for adult bookstore); Chesapeake B & M, Inc. v. Harford County, Md., 831 F.Supp. 1241, 1249-50 (D. Md.1993) (44-day time period for review of adult bookstore licensing application not unreasonable), rev'd in part, vacated in part, and remanded on other grounds, 58 F.3d 1005 (4th Cir.1995) (en banc); Wolff v. City of Monticello, 803 F.Supp. 1568, 1574 (D. Minn.1992) (noting that 90-day time period for decision on adult bookstore license application not unreasonable per se); see generally Thirty-Seven Photographs, 402 U.S. at 371-74, 91 S.Ct. at 1405-07 (construing federal statute imposing a prior restraint to require that judicial review be sought within 14 days and concluding that delays of between 40 days and six months could not be sanctioned). In addition, the record is devoid of any evidence that would support the necessity of a 150-day delay to complete the administrative review process for the zoning scheme implemented by the County.

[16] Moreover, the Prince George's County adult bookstore ordinance imposes a significant hardship on such

establishments. In Riley, 487 U.S. at 801-02, 108 S.Ct. at 2680-81, the Court concluded that a North Carolina law, which required professional fundraisers to apply for a license prior to soliciting charitable contributions in the state, was unconstitutional because it failed to impose time limitations on when a decision on the application had to be rendered and compelled the fundraisers' silence during the delay. See also Famine Relief Fund v. West Virginia, 905 F.2d 747, 753 (4th Cir.1990) (applying Freedman factors and holding that a West Virginia charitable solicitation statute was an unconstitutional prior restraint on speech in part because it prohibited charitable organizations, whose application for a permit to solicit in the state had been denied, from doing so pending judicial vindication). Similarly, the Prince George's County adult bookstore ordinance requires that applicants for a special exception refrain from operating until the exception is granted. (FN14)

Although the County may properly regulate the time, place, and manner of the operation of an adult bookstore through its zoning ordinances, to pass constitutional muster any zoning ordinance imposing a prior restraint on the exercise of protected speech must provide for a determination in a specified and reasonably brief period of time. Under the circumstances presented here, we cannot say that the 150-day time period for decision imposed by the County satisfies this standard.

B.

[17] Warwick Books also asserts that the ordinance imposes an unconstitutional prior restraint on speech because

Appendix A

Maryland law fails to assure prompt judicial review of an administrative denial. Although the County acknowledges that access to the judicial system would not be available until a final administrative decision is rendered--a period of up to 150 days after an application is filed--it nevertheless asserts that prompt judicial review is available because an applicant for a special exception may seek judicial review of the denial of its application immediately after an administrative decision is rendered.

The County bases its argument on Part II of Justice O'Connor's opinion in FW/PBS, maintaining that it relaxes Freedman 's prompt judicial review requirement. Although the County recognizes that Justice O'Connor was writing for only three members of the Court in this portion of her opinion, it argues that because three other members of the Court--Chief Justice Rehnquist, Justice White, and Justice Scalia--concurred in part and dissented in part, reasoning that the Dallas licensing scheme *999 should not be analyzed under Freedman at all, these Justices implicitly agreed with Justice O'Connor that the Freedman protections should be diminished. We disagree.

Justice White and Chief Justice Rehnquist did not join in Part II of Justice O'Connor's opinion, arguing instead that because the licensing scheme was a valid time, place, and manner restriction, it need not be analyzed as a prior restraint. Justice Scalia believed that the sale or rental of sexually explicit materials was not protected by the First Amendment, so there was no prior restraint of protected speech; consequently, he refused to join Part II of Justice O'Connor's opinion. Since these three Justices did not

believe that the ordinance was subject to prior restraint analysis, it is impossible to conclude that if they had agreed with Justice O'Connor that the licensing scheme was subject to prior restraint analysis, lesser protection should have been provided.

Moreover, it is well settled that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976)). Thus, even if Justice O'Connor's opinion in FW/PBS could be read as having altered the Freedman "prompt judicial review" factor (which it cannot, as discussed below), because this position obviously did not gain the assent of the concurring Justices (Brennan, Marshall, and Blackmun, who made clear that they believed that all three of the Freedman procedural safeguards were required), FW/PBS could not have modified Freedman. (FN15)

Further, Part II of Justice O'Connor's opinion did not relax the Freedman prompt judicial review requirement. The County focuses on Justice O'Connor's language referring to the possibility or availability of, or an "avenue for," "prompt judicial review" to conclude that Justice O'Connor reduced the protection required by the prompt judicial review factor of Freedman. However, Justice O'Connor never gave any indication that she was altering the prompt judicial review requirement. Rather, Justice O'Connor reasoned: (1)

that in Freedman three procedural safeguards were identified; (2) that because licensing schemes are different from censorship schemes less protection is necessary for licensing schemes; (3) that the "core policy underlying Freedman" was that a "license for a First Amendment-protected business must be issued (FN16) within a reasonable period of time" to avoid "the unconstitutional suppression of protected speech"; and (4) that "[t]hus, the first two safeguards are essential." FW/PBS, 493 U.S. at 227-28, 110 S.Ct. at 606 (emphasis added). She next concluded that the two essential procedural safeguards (time limits on decision and prompt judicial review) were not satisfied by the Dallas licensing scheme, and it therefore was an unconstitutional prior restraint. Finally, she determined that the third Freedman factor need not be applied to the licensing scheme because of its differences from a censorship scheme. Again, nothing in this analysis can be read to support the conclusion that Justice O'Connor was relaxing the prompt judicial review requirement.

Nor can Justice O'Connor's choice of the words of "prompt judicial review" support a conclusion that she relaxed this requirement. First, when Justice O'Connor refers to "prompt judicial review," she cites to Freedman, and it is unmistakable that Freedman required that "[a]ny restraint imposed in advance of a final judicial determination on the merits must ... be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." Freedman, 380 U.S. at 59, 85 S.Ct. at 739 (emphasis added). In addition, other decisions prior to Justice O'Connor's in FW/PBS, including Freedman, used the phrase *1000 "prompt judicial review" to mean a

prompt judicial determination. See, e.g., Southeastern Promotions, Ltd., 420 U.S. at 561-62, 95 S.Ct. at 1247-48 (holding that "board's system did not provide a procedure for prompt judicial review" where judicial decision on the merits was not obtained for more than five months); Thirty-Seven Photographs, 402 U.S. at 367-70, 91 S.Ct. at 1403-05 (using the term "prompt judicial review" as synonymous with "a prompt judicial decision"); Blount v. Rizzi, 400 U.S. 410, 417, 91 S.Ct. 423, 428, 27 L.Ed.2d 498 (1971) (stating that in Freedman the Court "held that to avoid constitutional infirmity a scheme of administrative censorship must ... require 'prompt judicial review'--a final judicial determination on the merits within a specified, brief period"); Freedman, 380 U.S. at 58-60, 85 S.Ct. at 738-40 (using "prompt judicial review" as synonymous with "prompt judicial decision"). Thus, it is clear that Justice O'Connor was alluding to a judicial decision within a specified, brief time when she referred to "prompt judicial review" and that in using these terms interchangeably, she broke no new ground. Thus, read in context, it is simply not reasonable to take her statements that there must be "an avenue for" or "the possibility of" "prompt judicial review" to mean that mere access to judicial review is sufficient to satisfy this requirement.

One additional point suggests that this is the case. In his dissent from Part II of Justice O'Connor's opinion, Justice White wrote that "no one suggests that licensing decisions are not subject to immediate appeal to the courts." FW/PBS, 493 U.S. at 248, 110 S.Ct. at 617. Indeed, while the Dallas licensing scheme itself did not provide for the judicial review, judicial review of decisions of the permit and license

appeal board was available. See Dallas Tex., Code Sec. 2-96 (1994); Dumas, 648 F.Supp. at 1067 n. 16; see also M.J.R.'s Fare of Dallas, Inc. v. Permit & License Appeal Bd. of Dallas, 823 S.W.2d 327, 329 (Tex.Ct.App.1991). Thus, the majority of the FW/PBS Justices held that there was no "avenue for prompt judicial review," 493 U.S. at 229, 110 S.Ct. at 606, even though the possibility of immediate review by the courts following a license denial was available.

In sum, because Justice O'Connor's decision in FW/PBS cannot properly be read to relax the Freedman prompt judicial review requirement, and because a majority of the Justices of the Supreme Court did not join this reasoning, even if it were susceptible to the reading the County would give it, this court has no authority for failing to apply the prompt judicial review requirement of Freedman. (FN17) In Freedman, the Court held that ***1001** procedures which allowed up to four months for an initial judicial decision did not provide for sufficiently prompt judicial review in the film censorship context. 380 U.S. at 55, 59-60, 85 S.Ct. at 737, 739-40. After holding that the Maryland procedures failed to pass constitutional muster, the Court compared them with those in a New York statute fashioned to prevent the sale of obscene books that was upheld in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) (requiring a trial one day after the joinder of issues and a resolution within two days after the trial). Freedman, 380 U.S. at 60, 85 S.Ct. at 739-40; see also Blount, 400 U.S. at 419-22 & n. 7, 91 S.Ct. at 430-31 & n. 7 (holding that a federal statute constituted an unconstitutional prior restraint on speech in part because it failed to provide for a prompt judicial adjudication and

reiterating "that the procedure considered in Kingsley Books ... [was] a model") (internal quotation marks omitted); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n. 22, 88 S.Ct. at 1306 n. 22 (1968) (holding prompt judicial review was assured by provision requiring a judicial determination within nine days of the decision of the administrative body); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) (noting that prior restraint on speech "tolerated ... only where it ... assured an almost immediate judicial determination of the validity of the restraint"); Redner v. Dean, 29 F.3d 1495, 1501-02 (11th Cir.1994) (holding that prompt judicial review is never available when judicial review may not be sought until exhaustion of administrative remedies under a scheme that fails to provide adequate time restraints for administrative decision), cert. denied, --- U.S. ----, 115 S.Ct. 1697, 131 L.Ed.2d 560 (1995); cf. East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 225 (6th Cir.1995) (indicating that potential delay of five months from application to judicial hearing is impermissible). In Thirty-Seven Photographs, the Court noted that delays in judicial determination as long as three months could not be sanctioned and construed a federal statute to require a judicial decision within 60 days to uphold the constitutionality of the statute. 402 U.S. at 372-74, 91 S.Ct. at 1406.

[18] The parties do not dispute that even with the benefit of the administrative order, at least 103 days would typically be required to obtain a judicial ruling after the denial of an application for a special exception. Given the instruction provided by the Court, we cannot conclude that a

delay in excess of three months for judicial decision, following a 150-day time frame for an administrative decision, ensures a sufficiently prompt judicial review. (FN18)

V.

The questions presented are difficult, and there is little authority to guide our decision. Nevertheless, it is undisputed that an adult bookstore which seeks a special exception will face an eight-month delay from the date the application is filed to a judicial resolution of the denial of the application. Given current precedent, we cannot accept that the length of this delay can be considered the type of brief specified period followed by ***1002** prompt judicial review that is required to guard against the abridgement of protected speech. Thus, we hold that the Prince George's County adult bookstore ordinance is an unconstitutional prior restraint on protected speech.

REVERSED.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

In this case and the related case of Chesapeake B & M, Inc. v. Harford County, Md., 58 F.3d 1005, both decided today, the majority opinions have stricken down as unconstitutional ordinances enacted by two Maryland counties to regulate the secondary effects of adult bookstores whose business is to sell sexually explicit materials and to provide sexually oriented entertainment. These ordinances

do not directly prohibit the sale of sexually explicit material; rather they prohibit any "adult bookstore," as defined in each ordinance, from conducting business without first obtaining a license (a "permit" in Harford County and a "special exception" in Prince George's County).

The ordinance in this case--in contradistinction to that in Chesapeake B & M--does confer some discretion upon county executives in determining whether to approve a special exception to operate an adult bookstore. (FN1) The county's District Council will grant a "special exception" permitting the operation of an adult bookstore only if it finds that the bookstore "meets the standards" set forth in Sec. 27-904(b) & (c). Those standards consist of 13 factors relating to the potential effect of the bookstore on the land and its surroundings.

The Prince George's County ordinance is a zoning regulation which seeks to impose restrictions on the operation of an adult bookstore in order "to lessen or control the adverse secondary effects of such stores on their surrounding neighborhoods," Sec. 27-901(b)(1), and "to prevent access to such stores by children," Sec. 27-901(b)(3). The ordinance does not prohibit outright the sale of sexually explicit material; rather it prohibits the sale of such material by an adult bookstore where the aggregation of such sales tends to produce the adverse secondary effects that the county seeks to ameliorate.

Because some substantive discretion is conferred upon Prince George's County officials by this ordinance, distinguishing it from the Harford County ordinance which is

the subject of our related decision in Chesapeake B & M, I am inclined to agree that the safeguards described in FW/PBS, Inc. v. Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), should be applied in this case. I also concur in the majority's conclusion that the 150-day time frame for administrative decisionmaking may be too long and may confer too much discretion in respect to the length of the decisionmaking process. See FW/PBS, 493 U.S. at 227, 110 S.Ct. at 605. But I disagree with the majority's conclusion that the Prince George's County ordinance is unconstitutional under FW/PBS because it does not provide Warwick Books with prompt access to judicial review. (FN2) On the same day that the county denies an application for a special exception, the applicant may obtain access to the courts of Maryland. I conclude that this is all that is required by the FW/PBS safeguard that expeditious review be available. Contrary to the position taken by the majority, I would interpret that safeguard as requiring only that exit from the executive branch (the administrative permit system) be prompt and that access to the judicial system be immediately available. Since the nature of the safeguard is access to a court, and not the rendering of any given decision of the court, I cannot subscribe to the position that the procedural safeguard requires prompt completion of the judicial review any more than it requires a particular result. At least three other circuits share ***1003** this view. See Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068 (5th Cir.1994); TK's Video v. Denton County, 24 F.3d 705 (5th Cir.1994); Graff v. Chicago, 9 F.3d 1309 (7th Cir.1993) (en banc); Jews for Jesus v. Massachusetts Bay Trans. Author., 984 F.2d 1319 (1st Cir.1993). Cf. O'Connor v. City and County of Denver, 894 F.2d 1210 (10th Cir.1990) (declining to apply FW/PBS

safeguards where it found adult entertainment licensing scheme imposed no restraint and where plaintiff theater was closed because of significant number of acts of public indecency).

In any event, in this case the Maryland Rules provide for a prompt judicial decision.

I

Beginning with the conclusion that "expeditious judicial review of [the executive's] decision must be available," see FW/PBS, 493 U.S. at 227, 110 S.Ct. at 606, the majority opinion errs in interpreting the nature of that safeguard to mean that "expeditious judicial review" requires a prompt "judicial ruling" or "judicial decision." Op. at 1001. That additional requirement of securing a prompt judicial decision is not, I submit, imposed by FW/PBS, is unnecessary in the absence of direct prior restraint of speech, and misconstrues the essence of the safeguard.

First, it must be recognized that FW/PBS provides no Court opinion addressing the issue. Justice O'Connor's opinion, on which the majority relies, was joined only by Justices Stevens and Kennedy. While Justices Brennan, Marshall, and Blackmun joined in a separate opinion urging greater protection than that articulated in Justice O'Connor's opinion, they did not join in her opinion. (FN3) 493 U.S. at 238, 110 S.Ct. at 611. Consequently, the majority can logically claim no greater safeguard than that imposed in Justice O'Connor's opinion.

Appendix A

As Justice O'Connor concluded in FW/PBS, a licensing ordinance designed to address the secondary effects of adult oriented businesses need not provide the full procedural safeguards required of a direct censorship law. 493 U.S. at 228, 110 S.Ct. at 606. Such a licensing law impinges only incidentally upon protected speech, because it is aimed at the secondary effects of such speech rather than its content. As Justice O'Connor noted in FW/PBS, the licensor need not bear the burden of going to court or the burden of proof once in court. See 493 U.S. at 227-230, 110 S.Ct. at 605-07. Moreover, an ordinance of the type under consideration there must only provide the "possibility of prompt judicial review," 493 U.S. at 228, 110 S.Ct. at 606, or "an avenue for prompt judicial review," id. at 229, 110 S.Ct. at 606. Thus, I conclude from Justice O'Connor's express language that an adult bookstore licensing law that does not impose direct censorship of materials need only provide for prompt access to judicial review and need not guarantee a prompt completion of the judicial review process.

Since the decision in FW/PBS, at least three courts of appeals which have considered the appropriate standard to be applied with respect to judicial review of license denials implicating free speech have reached the same conclusion. See Graff v. Chicago, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc) (holding that availability of state's common law procedure for seeking a writ of certiorari in court to review an administrative agency decision regarding the licensing of sidewalk newsstands is sufficient to meet the FW/PBS 's "prompt judicial review" requirement); TK's Video v. Denton County, 24 F.3d 705, 709 (5th Cir.1994) (holding that FW/PBS 's requirement of "prompt judicial review" is

satisfied by "access [to] the courts within a brief period," i.e., by giving the aggrieved party 30 days to appeal to court); Grand Brittain, Inc. v. City of Amarillo, Texas, 27 F.3d 1068, 1070 (5th Cir.1994) ("We have interpreted [FW/PBS 's "prompt judicial review"] language to require only access to the courts within a specified brief period."). See also Jews for Jesus v. Massachusetts Bay Transportation Authority, 984 F.2d 1319, 1327 (1st Cir.1993) (applying FW/ *1004. PBS 's standard to regulations of expressive activity in subway station, and holding that "prompt judicial review" is provided where applicant denied license may appeal denial in court and is granted hearing); cf. O'Connor v. City and County of Denver, 894 F.2d 1210 (10th Cir.1990) (declining to apply any of the Freedman procedural safeguards (as recast in FW/PBS) to the First Amendment analysis of adult entertainment licensing scheme on the ground that such scheme did not involve prior restraints and was based instead on licensee's failure to prevent patrons' engagement in public sex acts in theater).

Moreover, I believe that the nature of the safeguard--assurance of the availability of prompt judicial review--cannot meaningfully be interpreted to include the rendering of a court's decision. The essence of the safeguard is the review and not the result. When an executive official is given discretionary authority that can have the effect of censoring protected speech, the executive's decision must be reviewable by the judicial branch, and the promptness of instigating that judicial review is the requisite safeguard. Since there are no external checks on the judiciary's review, the scope of the safeguard of necessity ends with access to the judicial branch. If the judiciary agrees that protected

speech has been improperly censored, it can act within hours. On the other hand, if it concludes that the would-be censor acted properly and did not unconstitutionally suppress speech, then its decision ends the matter. While the judiciary may not get it right, its review, and not the result it reaches, defines the limit of the safeguard.

Thus, I would conclude that prompt judicial review as a safeguard means prompt exit from the executive branch and immediate entry into the judicial branch, and I believe that the better reading of FW/PBS supports this conclusion.

II

Even though I am satisfied that the Prince George's County ordinance meets the requirement of FW/PBS of providing prompt access to the courts, I note nevertheless that the Maryland Rules provide ample mechanisms for completing judicial review expeditiously should the need arise. Warwick Books is entitled to appeal to the Prince George's County Circuit Court on the very day it receives the county's decision, and it need not wait until the end of the 30-day period. Md. Rule 7-203. The record must be filed by the county within 60 days, but the rule provides expressly that"the court may shorten or extend the time for transmittal of the record." Md. Rule 7-206(d). Within 30 days after notification that the record has been filed, Warwick Books must file a memorandum. Md. Rule 7-207(a). The county has 30 days thereafter to file its answering memorandum, id., and Warwick Books then has 15 days to reply. Id. Pursuant to a special Prince George's County Circuit Court administrative order, oral argument must be held within five

days of the filing of the reply brief, and a decision must be rendered five days thereafter.

In addition to these specific procedural and administrative court rules, the Maryland Rules provide generally that the times specified by the rules "requir[ing] or allow[ing] an act to be done" may be shortened on the motion of any party and for cause shown. Md. Rule 1-204. Moreover, the Maryland Rules provide that a person may apply for an ex parte injunction or an interlocutory injunction at any time. The procedures for obtaining an ex parte injunction assure a most expedited schedule. See, e.g., Md. Rule BB72. These rules are repeatedly used to achieve the most prompt review and appeal of a broad array of time-sensitive issues, such as election disputes, death penalty cases, and public health matters.

There can be, I submit, no persuasive argument that prompt judicial review is not available through the ordinance, the administrative order, and through Maryland's rules of civil procedure. Accordingly, I dissent from that conclusion reached by the majority.

I am authorized to report that Judge Russell and Judge Widener join in this opinion.

FN1. The ordinance defines an adult bookstore as:

> any commercial establishment which does not otherwise qualify as a theater or nonprofit, free-lending library and which either:
>
> (1) Has ten percent (10%) or more of the value of its stock

on the premises, or has ten percent (10%) or more of the value of its stock on display, in books, periodicals, photographs, drawings, sculptures, motion pictures, films, or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement; or

(2) Has on the premises one (1) or more mechanical devices specifically for the purpose, in whole or in part, of viewing such materials.

Prince George's County, Md., Code Sec. 27-902(b).

FN2. An adult bookstore must blacken or obstruct its windows, doors, or other apertures to prevent persons outside the establishment from viewing the interior; limit the number of its business signs to one; prohibit access to anyone under age 18; and may not locate within 1,000 feet of certain types of property--for example, residentially-zoned property, schools, libraries, parks, playgrounds, recreational facilities, and churches. Prince George's County, Md., Code Secs. 27-903(b), 27-904(c)(1).

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FN3. The ordinance requires that the District Council consider:

(1) The nature of the proposed site ...;

(2) Traffic conditions, including the resulting traffic patterns;

(3) The nature of the surrounding area and the extent to which the proposed use might impair its present and future development;

(4) The proximity of dwellings, churches, schools, public structures, and other places of public gatherings;

(5) The probable effect of the proposed use on the peace and enjoyment of people in their homes;

(6) Facilities for sewers, water, schools, transportation, and other services, and the ability of the County to supply such services;

(7) The limitations of fire and rescue equipment and the means of access for fire and police protection;

(8) The preservation of cultural and historical landmarks and trees;

(9) The probable effect of noise, vibrations, smoke and particulate matter, toxic matter, odorous matter, fire and explosion hazards, and glare upon the uses of surrounding properties;

(10) The purpose and intent of this Subtitle, as set forth in its other sections;

(11) The most appropriate use of land and structures;

(12) The conservation of property values; and

(13) The contribution, if any, such proposed use, building, or addition would make toward the deterioration of areas and neighborhoods.

Id. Sec. 27-904(b).

FN4. Although the Prince George's County zoning laws generally provide the District Council with authority to remand applications for further proceedings or clarification, the County represented at oral argument that it interprets Sec. 27-904.01(j) to require that any remand of an application of an adult bookstore for a special exception be accomplished within the 150-day time frame for decision unless the applicant agrees to an extension. However, this limitation is not plain from the face of the ordinance; the ordinance has not been authoritatively construed in this manner; and the County does not rely on a well-established practice to support its interpretation. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 770 & n. 11, 108 S.Ct. 2138, 2151 & n. 11, 100 L.Ed.2d 771 (1988). Nevertheless, because we conclude that the 150-day time frame for an administrative determination fails to provide for a decision within a reasonably brief period, we need not consider whether the remand provisions render the 150-day period for decision illusory.

FN5. A petition for judicial review of the final administrative decision must be filed within 30 days. Md. R. 7-203(a). The record shall be filed by the agency within 60 days after the agency receives the petition, but this time period may be extended for up to an additional 60 days. Md. R. 7-

206(c)(d). Within 30 days after the clerk sends notice that the record has been filed, the petitioner must file a memorandum. Md. R. 7-207(a). The respondent has 30 days after service of the petitioner's memorandum to file its answering memorandum. Id. The petitioner is then given 15 days to file a reply. Id.

FN6. Warwick Books also challenged the amended ordinance on the bases that it is not narrowly tailored to advance a significant state interest, that the "County did not rely upon sufficient evidence in enacting" the ordinance, and that the ordinance granted unfettered discretion to zoning officials and is therefore subject to manipulation and arbitrary application. The parties agreed before the district court that the prior decision of this court required a ruling adverse to Warwick Books on these issues, and the district court summarily ruled in favor of the County on them. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 828 F.Supp. 370, 374 n.1 (D.Md.1993).

FN7. While Warwick Books lists other issues in its appellate brief, it failed to brief or argue them. Federal Rule of Appellate Procedure 28(a)(6) requires that an appellate brief "contain the contentions ... on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." Because Warwick Books elected not to assert any reasons for, or arguments supporting, a conclusion that the Prince George's County adult bookstore ordinance is unconstitutional for any of these other reasons, we deem these issues abandoned. See, e.g., Cades v. H & R Block, Inc., 43 F.3d 869, 876 (4th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 2247, 132 L.Ed.2d 255

(1995); Hatley v. Lockhart, 990 F.2d 1070, 1073 (8th Cir.1993) (" '[A] party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue.' ") (quoting Jasperson v. Purolator Courier Corp., 765 F.2d 736, 740 (8th Cir.1985)); Winston v. Children & Youth Servs. of Del. County, 948 F.2d 1380, 1385 (3d Cir.1991) (noting that " '[a]n issue that is not addressed [in compliance with Rule 28] in an appellant's brief is deemed waived on appeal' ") (first alteration in original) (quoting Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 88 (3d Cir.1987)), cert. denied, 504 U.S. 956, 112 S.Ct. 2303, 119 L.Ed.2d 225 (1992). Accordingly, we do not address these issues.

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FN8. The First Amendment provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech," U.S. Const. amend. I, and applies to the states and their political subdivisions through the Fourteenth Amendment, City of Ladue v. Gilleo, --- U.S. ----, ---- n. 1, 114 S.Ct. 2038, 2040 n. 1, 129 L.Ed.2d 36 (1994).

FN9. The Supreme Court noted in Renton that in addition to the zoning ordinance under review, the City of Renton had also passed a resolution imposing "a moratorium on the licensing of 'any business ... which ... has as its primary purpose the selling, renting or showing of sexually explicit materials.' " Renton, 475 U.S. at 44, 106 S.Ct. at 927 (alteration in original). However, the decision makes plain that the zoning ordinance--not the resolution concerning business licenses--was the law challenged. See id. at 43, 45, 47-55, 106 S.Ct. at 926, 927, 929-33; see also Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 529-30 (9th

Cir.1984), rev'd, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Indeed, it is difficult to imagine how the Court might have reached its conclusion that the 520 acres within the city in which adult theaters could locate under the zoning ordinance allowed for reasonable alternative avenues of communication if it had considered the zoning ordinance in tandem with the "moratorium" on licensing adult businesses.

FN10. Similarly, the decisions relied upon by the Renton Court did not address zoning schemes that imposed prior restraints on businesses seeking to engage in protected speech.

FN11. Indeed, the Court has repeatedly stated that " '[a]ny system of prior restraint ' " bears " 'a heavy presumption against its constitutional validity.' " FW/PBS, 493 U.S. at 225, 110 S.Ct. at 604 (alteration in original; emphasis added) (quoting Southeastern Promotions, Ltd., 420 U.S. at 558, 95 S.Ct. at 1246); see also Freedman, 380 U.S. at 57, 85 S.Ct. at 738; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).

FN12. In FW/PBS, three members of the Court concluded that the third Freedman requirement--that the censor bear both the burden of initiating judicial action and the burden of proof in the judicial proceeding--should not apply to the licensing scheme under review. Justice O'Connor, joined by Justices Stevens and Kennedy, reasoned that this requirement was unnecessary to adequately protect freedom of expression because the ordinance was content neutral--and therefore was not presumptively invalid--and because the applicant for a business license had a great incentive to pursue a judicial

determination. See FW/PBS, 493 U.S. at 228-30, 110 S.Ct. at 606-07. Justices Brennan, Marshall, and Blackmun concurred in the judgment, opining that each of the three Freedman procedural safeguards were applicable in analyzing the constitutionality of the Dallas licensing scheme. Id. at 238-42, 110 S.Ct. at 611-13. Chief Justice Rehnquist and Justice White would have held that because the licensing scheme was a content neutral time, place, and manner restriction, prior restraint analysis need not be applied. Id. at 244-49, 110 S.Ct. at 604-17. Justice Scalia dissented on other grounds. Id. at 250-64, 110 S.Ct. at 617-25. The splintered opinion of the FW/PBS Court leaves the continued application of the third Freedman factor subject to some speculation. However, Warwick Books raises no challenge to the Prince George's County adult bookstore ordinance based upon the third Freedman requirement, and therefore we need not address its application.

FN13. The type of review necessary to determine whether a film is obscene, the issue in Teitel Film Corp. and Freedman, is quantitatively and qualitatively different from the types of evaluations that government officials must make in other contexts. See Thirty-Seven Photographs, 402 U.S. at 374, 91 S.Ct. at 1407. And, the need for haste is particularly great in the film exhibition context due to the relatively brief time period during which exhibitors typically present any given film. See Freedman, 380 U.S. at 61, 85 S.Ct. at 740. A determination concerning the licensing or zoning of an adult bookstore, on the other hand, necessarily entails scrutiny of a greater variety of factors, and the applicant for permission to operate such an establishment has a greater incentive to endure the burdens associated with securing

permission because approval of the application "is the key to the applicant's obtaining and maintaining a business." FW/PBS, 493 U.S. at 230, 110 S.Ct. at 607.

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FN14. We note that when the County amended its adult bookstore ordinance effective June 30, 1992 to impose time limitations on the decisionmaking process, it extended an amortization period for certified nonconforming adult bookstores. The amended ordinance provided that nonconforming adult bookstores could not continue to operate unless they applied for and obtained a special exception, but they were permitted to operate until January 1, 1993. Prince George's County, Md., Code Sec. 27-903(c). Thus, the ordinance provided a time period within which adult bookstores could continue to operate while seeking a special exception. Whatever effect this grace period might have with respect to a challenge to the ordinance as applied, it does not resolve the facial challenge advanced by Warwick Books.

FN15. Rather, the narrowest ground for decision was that the licensing scheme at issue constituted a prior restraint requiring procedural safeguards and that two such safeguards were lacking.

FN16. Obviously, a license which has been erroneously denied at the administrative level cannot be "issued" until a judicial determination is rendered.

FN17. As an additional support for its contention that the availability of judicial review satisfies the prompt judicial

review requirement set forth in Freedman, the County points to the decisions of several other courts of appeals and suggests that other courts uniformly have held that mere availability of judicial review is adequate. However, this is simply not so; the circuits are split on this question.

The first decision to which the County points is Graff v. City of Chicago, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc), cert. denied, --- U.S. ----, 114 S.Ct. 1837, 128 L.Ed.2d 464 (1994). Graff was an en banc decision of the Seventh Circuit in which twelve judges participated. The appeal produced a badly divided court, much like FW/PBS itself. In addressing the argument that a Chicago licensing scheme for newsstands did not provide "prompt judicial review," the "principal opinion" authored by Judge Manion concluded that although the Chicago scheme did not itself provide for judicial review, judicial review of the licensing decision was available through a common-law writ of certiorari. Although Judge Manion's opinion apparently concludes that this review is adequate to satisfy the "prompt judicial review" requirement, it does not discuss whether the procedures available for a common-law writ require a prompt judicial decision. And, of critical importance, only five judges (including Judge Manion) joined this principal opinion, which contains the only portion of the Graff decision to which the County points in support of its conclusion. Therefore, Judge Manion's opinion is not a majority opinion of the Seventh Circuit. Interestingly, the seven judges who wrote to concur in the judgment or dissent all indicated their disagreement with Judge Manion's conclusion that the mere availability of judicial review satisfied the

prompt judicial review requirement. Thus, the Graff decision does not hold that the prompt judicial review requirement is satisfied when judicial review is merely available.

The other two decisions to which the County points, TK's Video, 24 F.3d at 708-09, and Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319, 1327 (1st Cir.1993), do hold that the requirement of "prompt judicial review" is satisfied by providing access to the courts after an administrative denial despite the fact that there was apparently no requirement for a prompt judicial decision. But, in neither decision does the court attempt to argue, as does the County, that its holding can be supported by reading FW/PBS to relax the traditional "prompt judicial review" requirement. Further, neither decision attempts to analyze why the conclusion it reaches is consistent with Supreme Court precedent in this area. Thus, we do not find these decisions persuasive on this question.

Finally, after the briefing of this appeal was completed, the Sixth Circuit decided East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 224-25 (6th Cir.1995), which unequivocally rejected the argument that mere access to judicial review satisfies the Freedman prompt judicial review requirement.

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FN18. The County stresses that it has no control over the time limitations imposed by the Maryland Rules. However, the County is not without means to ensure that

judicial review proceeds more promptly. For example, the County may impose upon itself more limited time restraints for filing the administrative record and responsive pleadings and memoranda than those provided by Maryland procedure. Moreover, the County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until a judicial determination is rendered affirming a denial of a special permit.

FN1. Adult bookstores are defined as commercial establishments which have 10% or more of the value of their stock in sexually explicit materials. Section 27-902(b)(1).

FN2. Justice O'Connor's opinion in FW/PBS held, in striking down the Dallas ordinance as unconstitutional, that (1) any restraint on speech prior to judicial review can be only for a brief period during which the status quo is maintained and (2) "expeditious judicial review of [the executive's] decision must be available." 493 U.S. at 227, 110 S.Ct. at 606.

FN3. These justices urged application of the safeguards articulated in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), a position not shared by a majority of the Court. 493 U.S. at 239, 110 S.Ct. at 611.

APPENDIX B

11126 BALTIMORE BOULEVARD, INCORPORATED, t/a Warwick Books,

Plaintiff-Appellant,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, Defendant-Appellee.

No. 93-2151.
United States Court of Appeals,
Fourth Circuit.
Argued June 7, 1994.
Decided Aug. 12, 1994.
Rehearing In Banc Granted; Opinion Vacated Nov. 2, 1994.

OPINION

WILKINS, Circuit Judge:

11126 Baltimore Boulevard, Incorporated, t/a Warwick Books, brought this action pursuant to 42 U.S.C.A. Sec. 1983 (West 1981), claiming that the Prince George's County, Maryland adult bookstore ordinance, Prince George's County, Md., Code subtit. 27, part 16, violates the First and Fourteenth Amendments of the United States Constitution. The district court granted summary judgment in favor of the County. Warwick Books appeals, contending that the ordinance constitutes an unconstitutional prior restraint on speech because it fails to provide for adequate procedural safeguards. We agree and reverse the judgment of the district court.

Appendix B

I.

In May 1986, Warwick Books filed an action in the district court maintaining that the Prince George's County adult bookstore ordinance in effect at that time violated the First and Fourteenth Amendments. Although the district court concluded that the ordinance constituted a content-neutral time, place, and manner restriction, it found the ordinance unconstitutional as applied to adult bookstores because the interest advanced by the County was not sufficiently supported by evidence in the legislative record and because the standards to be applied in determining whether a special exception should be granted were vague and subject to arbitrary manipulation. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 684 F.Supp. 884, 891, 899 (D. Md.1988). This court reversed the decision of the district court, concluding that the ordinance constituted a content-neutral time, place, and manner restriction which was narrowly tailored to serve the interest of Prince George's County in minimizing the secondary effects associated with, and protection of children from, adult bookstores and that it provided for ample other opportunities for speech. 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415, 1420, 1426 (4th Cir.1989). Additionally, we determined that the adult bookstore ordinance "provide[d] definite guidelines, consistent with the substantial and legitimate interests advanced by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit." Id. at 1427. Although not all of the steps in the process leading to a decision on an application for a special exception were bound by precise time limitations, we noted that the length of

the process necessary to obtain a special exception did not render the ordinance an unconstitutional prior restraint because the uncontradicted evidence submitted by County officials indicated that the application process normally took approximately six months. Id. at 1428 n. 8. We also observed that adult bookstores were generally permitted to continue operation while the exception was sought. Id.

Thereafter, the Supreme Court rendered its decision in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), holding that a Dallas business licensing scheme constituted an unconstitutional prior restraint on protected speech because it failed to impose adequate procedural ***112** safeguards to ensure a prompt decision on a license application and prompt judicial review of a denial. The Court granted Warwick Books' petition for writ of certiorari, vacated our decision in 11126 Baltimore Boulevard, and remanded for reconsideration in light of FW/PBS. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990). On remand, we learned that the County had amended its adult bookstore ordinance to remedy the deficiencies identified in the prior district court decision. 11126 Baltimore Blvd. v. Prince George's County, Md., 924 F.2d 557 (4th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 76, 116 L.Ed.2d 50 (1991). And, although the County asserted that it intended to return to its prior zoning ordinance if this court upheld the constitutionality of the prior ordinance, we concluded that the County was seeking an advisory opinion and dismissed the appeal. Id.

Following our dismissal, the County further amended its

adult bookstore ordinance. As presently codified, the ordinance prohibits adult bookstores (FN1) from operating anywhere in the County unless they obtain a special exception and adhere to other requirements imposed by the ordinance. (FN2) Prince George's County, Md., Code Sec. 27-903. To obtain a special exception, adult bookstores must file an application. In reviewing the application, the ordinance requires that the District Council for Prince George's County consider a number of factors bearing on the suitability of the proposed site for an adult bookstore. (FN3) Id. Sec. 27-904(b). In addition, the ordinance requires that the administrative review procedure be concluded and that the District Council render its decision on the application for a special exception within 150 days after the acceptance of a complete application. Id. Sec. 27-904.01. If the District Council fails to render a decision within 150 days, the application is deemed denied. Id. Sec. 27-904.01(i). (FN4)

Although the ordinance itself contains no provision for judicial review, the parties ***113** agree that Maryland law provides for judicial review of final administrative decisions. See Md. Ann.Code art. 66B, Sec. 4.08 (1988 & Supp.1993). Under Maryland procedural rules, at least 100 days would typically elapse before briefing could be completed. (FN5) The administrative judge of the Circuit Court for Prince George's County issued an administrative order providing that an appeal from an administrative decision relating to the Prince George's County adult bookstore ordinance is to be assigned to a specific judge, who shall schedule oral argument no later than five days after the day for filing a reply brief under the Maryland Rules and shall thereafter render a decision within five days after the conclusion of oral

argument. In re B-Rule Appeals in Adult Bookstore Cases, Misc. No. ---- (Cir. Ct. Prince George's County, Md. March 19, 1993). Any extension of these judicially imposed time limitations may not be granted except by consent of the parties. Id.

[1] Warwick Books' instant action presents a facial challenge to the constitutionality of the amended ordinance. See FW/PBS, 493 U.S. at 223-24, 110 S.Ct. at 603-04. The parties agreed before the district court that there were no material factual disputes and that the sole issue presented for decision was whether the ordinance imposed sufficient procedural safeguards on administrative and judicial review to avoid being an unconstitutional prior restraint. (FN6) On cross motions for summary judgment, the district court entered judgment for the County. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 828 F.Supp. 370 (D. Md.1993). It noted that this court had previously ruled that the six-month estimate for processing special exceptions was not unreasonable and concluded that "if six months is reasonable, then five months must be also." Id. at 374. Moreover, the district court found no constitutional deficiency with the promptness of judicial review. Id. at 376. Warwick Books appeals this decision, claiming that the ordinance constitutes an unconstitutional prior restraint on speech because it does not provide for adequate procedural safeguards. (FN7)

II.

[2][3] The First Amendment provides in pertinent part that "Congress shall make no law ... abridging the freedom of

speech." U.S. Const. amend. I. (FN8) While it is undoubtedly true that the government may appropriately regulate the time, place, and manner of protected speech, see City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), any regulation that places a prior restraint on the exercise of free expression carries " 'a heavy presumption against its constitutional validity,' " Freedman v. Maryland, 380 U.S. 51, 57, 85 ***114** S.Ct. 734, 738, 13 L.Ed.2d 649 (1965) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)). The guarantee of freedom of speech afforded by the First Amendment is abridged whenever the government makes enjoyment of protected speech contingent upon obtaining permission from government officials to engage in its exercise under circumstances that permit government officials unfettered discretion to grant or deny the permission. See FW/PBS, 493 U.S. at 223-27, 110 S.Ct. at 603-05. Such discretion exists when a regulation creating a prior restraint on speech fails to impose adequate standards for officials to apply in rendering a decision to grant or deny the permission or when a regulation fails to impose procedural safeguards to ensure a sufficiently prompt decision. Id.

[4][5] Permitting government officials unbridled discretion presents an unacceptable risk of both indefinite suppression and chilling of protected speech. See id. at 227, 110 S.Ct. at 605; Freedman, 380 U.S. at 59, 85 S.Ct. at 739. Without the constraint of specific standards to guide the decisionmaker in judging whether a license should issue, an impermissible danger exists that an official may decide to exercise his judgment to suppress speech he personally finds

distasteful. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975). And, without procedural safeguards to ensure a prompt resolution, an applicant may conclude that seeking a determination is too burdensome a task to pursue, impermissibly chilling the exercise of protected speech. See Freedman, 380 U.S. at 59, 85 S.Ct. at 739. Thus, to pass constitutional muster a prior restraint on speech must contain adequate standards to prevent arbitrary application and procedural safeguards to ensure expeditious decision making. FW/PBS, 493 U.S. at 225-26, 110 S.Ct. at 604-05.

With respect to procedural safeguards, the Supreme Court identified in Freedman the following three requirements necessary to guarantee that a decision is rendered promptly: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." Id. at 227, 110 S.Ct. at 605 (citing Freedman, 380 U.S. at 58-60, 85 S.Ct. at 738-40).

Warwick Books asserts that the Prince George's County adult bookstore ordinance fails to provide adequate procedural safeguards--and thus constitutes an unconstitutional prior restraint on speech--because the 150-day time period imposed for a decision prior to judicial review is not a "specified brief period" and because prompt judicial review of a denial of a special exception application is unavailable. (FN9) We address these contentions in turn.

Appendix B

A.

A prior restraint on speech that imposes no time limitations on the decision-making process plainly fails to satisfy the first requirement set forth in Freedman. See, e.g., FW/PBS, 493 U.S. at 229, 110 S.Ct. at 606- *115 07; Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 802, 108 S.Ct. 2667, 2680, 101 L.Ed.2d 669 (1988); Vance v. Universal Amusement Co., 445 U.S. 308, 316-17, 100 S.Ct. 1156, 1161-62, 63 L.Ed.2d 413 (1980). However, no clear guideposts mark our way in determining whether the 150-day time period for decision established in the Prince George's County adult bookstore ordinance constitutes a "specified brief period."

In Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-42, 88 S.Ct. 754, 756, 19 L.Ed.2d 966 (1968), the Court summarily held that a period of 50 to 57 days for obtaining an administrative decision did not amount to a "specified brief period" in the film censorship context. Warwick Books asserts that Teitel Film Corp. should be read to establish a bright-line rule that a 50-day period for an administrative decision necessarily fails to meet the standard set forth in the first Freedman requirement. We cannot agree.

[6] "The core policy underlying Freedman is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." FW/PBS, 493 U.S. at 228, 110 S.Ct. at 606 (emphasis added). The reasonableness of the time period during which a restraint on speech may operate prior to

judicial review "may vary in different contexts." United States v. Thirty-Seven Photographs, 402 U.S. 363, 374, 91 S.Ct. 1400, 1407, 28 L.Ed.2d 822 (1971); see TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705, 708 (5th Cir.1994). Thus, a determination of the reasonableness of the time period during which the restraint on speech may constitutionally operate requires an examination of the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint. (FN10) See TK's Video, 24 F.3d at 708.

[7] We apply these factors in resolving whether the 150-day time period for decision imposed by the Prince George's County adult bookstore ordinance is a reasonably brief time period. Although zoning decisions necessarily involve a detailed examination of numerous factors, Prince George's County has failed to provide any evidence to support a conclusion that 150 days is the most reasonably prompt time frame within which a decision can be made. The ordinance is designed to ameliorate the adverse secondary effects of adult bookstores and to prevent exposure and access by children to such establishments by imposing time, place, and manner restrictions on the operation of adult bookstores. See Prince George's County, Md., Code Sec. 27-901(b). Comparison of schemes devised and time limitations imposed by other jurisdictions to remedy the perceived evils occasioned by adult bookstores discloses that the necessary inquiries may be performed in a shorter time frame than that imposed by Prince George's County. See TK's Video, 24 F.3d 705, 708 (upholding 60-day period for review of licensing application for adult bookstore); Chesapeake B & M, Inc. v. Harford County, Md., 831 F.Supp. 1241, 1249-50

(D. Md.1993) (44-day time period for review of adult bookstore licensing application not unreasonable); Wolff v. City of Monticello, 803 F.Supp. 1568, 1574 (D. Minn.1992) (noting that 90-day time period for decision on adult bookstore license application was not unreasonable per se); see generally, Thirty-Seven Photographs, 402 U.S. at 371-74, 91 S.Ct. at 1405-07 (construing federal statute imposing a prior restraint to require that judicial review be sought within 14 days and concluding that delays of between 40 days and six months could not be sanctioned).

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Moreover, because the Prince George's County ordinance prohibits adult bookstores from operating during the application process, it imposes a significant hardship on such establishments. In Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801-02, 108 S.Ct. 2667, 2680, 101 L.Ed.2d 669 (1988), the Court concluded that a North Carolina law, which required professional fundraisers to apply for a license prior to soliciting charitable contributions in the state, was unconstitutional because it failed to impose time limitations on when a decision on the application had to be rendered. See also Famine Relief Fund v. West Virginia, 905 F.2d 747, 753 (4th Cir.1990) (applying Freedman factors and holding that a West Virginia charitable solicitation statute constituted an unconstitutional prior restraint on speech because it prohibited charitable organizations, whose application for a permit to solicit in the state had been denied, from doing so pending judicial vindication). Similarly, the Prince George's County adult bookstore ordinance requires that applicants for a special exception refrain from operating until the exception is granted. (FN11)

[8] Although the County may properly regulate the time, place, and manner of an adult bookstore's operation through its zoning ordinances, to pass constitutional muster any zoning ordinance imposing a prior restraint on the exercise of protected speech must provide for a determination in as brief a time period as it may reasonably be accomplished. We cannot say that the 150-day time period for decision imposed by the County satisfies this standard.

B.

[9] Warwick Books also asserts that the ordinance imposes an unconstitutional prior restraint on speech because Maryland law fails to assure prompt judicial review of an administrative denial. In Freedman, the Court held that procedures which allowed up to four months for an initial judicial decision did not provide for sufficiently prompt judicial review in the film censorship context. 380 U.S. at 55, 59-60, 85 S.Ct. at 737, 739-40. The Court stated that "[a]ny restraint imposed in advance of a final judicial determination on the merits must ... be limited to ... the shortest fixed period compatible with sound judicial resolution." Id. at 59, 85 S.Ct. at 739. After holding that the Maryland procedures failed to pass constitutional muster, the Court compared them with those in a New York statute fashioned to prevent the sale of obscene books that was upheld in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) (requiring a trial one day after the joinder of issues and a resolution within two days after the trial). Freedman, 380 U.S. at 60, 85 S.Ct. at 739-40; see also Blount v. Rizzi, 400 U.S. 410, 419-20 & n. 7, 91 S.Ct. 423, 430 & n. 7, 27 L.Ed.2d 498 (1971) (holding a

federal statute constituted an unconstitutional prior restraint on speech in part because it failed to provide for a prompt judicial adjudication and reiterating "that the procedure considered in Kingsley Books ... [was] a model.") (internal quotation marks omitted); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n. 22, 88 S.Ct. 1298, 1306 n. 22, 20 L.Ed.2d 225 (1968) (holding prompt judicial review was assured by provision requiring a judicial determination within nine days of the decision of the administrative body); Bantam Books, 372 U.S. at 70, 83 S.Ct. at 639 (noting that prior restraint on speech "tolerated ... only where it ... assured an almost immediate judicial determination of the validity of the restraint"). In Thirty-Seven Photographs, the Court noted that delays in judicial determination as long as three months could not be sanctioned and construed a federal statute to require a judicial decision within 60 days to uphold the constitutionality of the statute. 402 U.S. at 372-74, 91 S.Ct. at 1406-07. The parties do not dispute that ***117.** even with the benefit of the administrative order, at least 110 days would typically be required to obtain a judicial ruling after the denial of an application for a special exception. Given the instruction provided by the Court, we cannot conclude that the three and one-half month time frame for judicial decision under the present Maryland procedures ensures a sufficiently prompt judicial review. (FN12)

III.

The questions presented are difficult, and there is little authority to guide our decision. Nevertheless, it is undisputed that at best an adult bookstore which seeks a special exception will face at least an eight-month delay from

the date the application is filed to a judicial resolution of the application. We do not believe that the length of this delay can be considered the type of brief specified period followed by prompt judicial review required to guard against the abridgement of protected speech. Thus, we hold that the Prince George's County adult bookstore ordinance is an unconstitutional prior restraint on protected speech.

REVERSED.

FN1. The ordinance defines an adult bookstore as:

> any commercial establishment which does not otherwise qualify as a theater or nonprofit, free-lending library and which either:
>
> (1) Has ten percent (10%) or more of the value of its stock on the premises, or has ten percent (10%) or more of the value of its stock on display, in books, periodicals, photographs, drawings, sculptures, motion pictures, films, or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement; or
>
> (2) Has on the premises one (1) or more mechanical devices specifically for the purpose, in whole or in part, of viewing such materials.
>
> Prince George's County, Md., Code Sec. 27-902(b).

FN2. An adult bookstore must blacken or obstruct its windows, doors or other apertures to prevent persons outside the establishment from viewing the interior; limit

the number of its b ness signs to one; prohibit access to anyone under age 18; and may not locate within 1,000 feet of certain types of property--for example, residentially zoned property, schools, libraries, parks, playgrounds, recreational facilities, and churches. Prince George's County, Md., Code # 8E8E # 27-903(b), 27-904(c).

FN3. The ordinance requires that the District Council consider:

(1) The nature of the proposed site ...;

(2) Traffic conditions, including the resulting traffic patterns;

(3) The nature of the surrounding area and the extent to which the proposed use might impair its present and future development;

(4) The proximity of dwellings, churches, schools, public structures, and other places of public gatherings;

(5) The probable effect of the proposed use on the peace and enjoyment of people in their homes;

(6) Facilities for sewers, water, schools, transportation, and other services, and the ability of the County to supply such services;

(7) The limitations of fire and rescue equipment and the means of access for fire and police protection;

(8) The preservation of cultural and historical landmarks and trees;

(9) The probable effect of noise, vibrations, smoke and particulate matter, toxic matter, odorous matter, fire and explosion hazards, and glare upon the uses of surrounding properties;

(10) The purpose and intent of this Subtitle, as set forth in its other sections;

(11) The most appropriate use of land and structures;

(12) The conservation of property values; and

(13) The contribution, if any, such proposed use, building, or addition would make toward the deterioration of areas and neighborhoods.

Id. Sec. 27-904(b).

FN4. Although the Prince George's County zoning laws generally provide the District Council with authority to remand applications for further proceedings or clarification, the County represented at oral argument that it interprets Sec. 27-904.01(j) to require that any remand of an application by an adult bookstore for a special exception be accomplished within the 150-day time frame for decision unless the applicant agrees to an extension.

FN5. A petition for judicial review of the final administrative decision must be filed within 30 days. Maryland Rule 7-

203(a). The record shall be filed by the agency within 60 days after the agency receives the petition, but this time period may be extended for up to an additional 60 days. Maryland Rule 7-206(c)-(d). Within 30 days after notification that the record has been filed, the petitioner must file a memorandum. Maryland Rule 7-207(a). The respondent has 30 days after service of the petitioner's memorandum to file its answering memorandum. Id. The petitioner is then given 15 days to file a reply. Id.

FN6. Warwick Books also challenged the amended ordinance on the bases that it is not narrowly tailored to advance a significant state interest, that the "County did not rely on sufficient evidence in enacting" the ordinance, and that the ordinance granted unfettered discretion to zoning officials and is therefore subject to manipulation and arbitrary application. The parties agreed before the district court that the prior decision of this court required a ruling adverse to Warwick Books on these issues, and the district court summarily ruled in favor of the County on them. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 828 F.Supp. 370, 374 n. 1 (D. Md.1993).

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FN7. While Warwick Books lists other issues in its appellate brief, it failed to brief or present argument on them. Accordingly, we do not address these issues.

FN8. The First Amendment applies to the states and its political subdivisions through the Fourteenth Amendment. City of Ladue v. Gilleo, --- U.S. ----, ---- n. 1, 114 S.Ct. 2038, 2040 n. 1, 129 L.Ed.2d 36 (1994).

FN9. In FW/PBS, three members of the Court concluded that the Freedman requirement that the censor bear both the burden of initiating judicial action and the burden of proof in the judicial proceeding should not apply to the licensing scheme of the sexually-oriented businesses under review. Justice O'Connor, joined by Justices Stevens and Kennedy, reasoned that this third Freedman requirement was unnecessary to adequately protect freedom of expression because the ordinance was content neutral--and therefore was not presumptively invalid--and because the applicant for a business license had a great incentive to pursue a judicial determination. See FW/PBS, 493 U.S. at 229-30, 110 S.Ct. at 606-07. Justices Brennan, Marshall, and Blackmun concurred in judgment, opining that each of the three Freedman procedural safeguards were applicable in analyzing the constitutionality of the Dallas licensing scheme. Id. at 238-42, 110 S.Ct. at 611-13. Justice White and Chief Justice Rehnquist would have held that because the licensing scheme was a content-neutral time, place, and manner restriction, no procedural safeguards were needed. Id. at 244-49, 110 S.Ct. at 614-17. Justice Scalia dissented on other grounds. Id. at 250-64, 110 S.Ct. at 617-25. The splintered opinion of the FW/PBS Court leaves the application of the third Freedman factor subject to some speculation. However, Warwick Books raises no challenge to the Prince George's County adult bookstore ordinance based upon the third Freedman requirement, and therefore we need not address its application.

FN10. The type of review necessary to determine whether a film is obscene, the issue in Teitel Film Corp. and Freedman, is quantitatively and qualitatively different from the types of

evaluations that government officials must make in other contexts. See Thirty-Seven Photographs, 402 U.S. at 374, 91 S.Ct. at 1407. And, the need for haste is particularly great in the film exhibition context due to the relatively brief time period during which exhibitors typically present any given film. See Freedman, 380 U.S. at 61, 85 S.Ct. at 740. A determination concerning the licensing or zoning of an adult bookstore, on the other hand, necessarily entails scrutiny of a greater variety of factors, and the applicant for permission to operate such an establishment has a greater incentive to endure the burdens associated with securing permission because approval of the application "is the key to the applicant's obtaining and maintaining a business." FW/PBS, 493 U.S. at 230, 110 S.Ct. at 607.

FN11. We note that when the County amended its adult bookstore ordinance effective June 30, 1992 to impose time limitations on the decisionmaking process, it extended an amortization period for certified nonconforming adult bookstores. The amended ordinance provided that nonconforming adult bookstores could not continue to operate unless they applied for and obtained a special exception, but they were permitted to operate until January 1, 1993. Thus, the ordinance provided a time period within which adult bookstores could continue to operate while seeking a special exception. Whatever effect this grace period might have with respect to a challenge to the ordinance as applied, it does not resolve the facial challenge advanced by Warwick Books.

FN12. The County asserted at oral argument that it had no control over the time limitations imposed by the Maryland

Rules. However, the County is not without means to ensure that judicial review proceeds more promptly. For example, the County may impose upon itself more limited time restraints for filing the administrative record and responsive pleadings and memoranda than those provided by Maryland procedure.

APPENDIX C

11126 BALTIMORE BOULEVARD, INC., t/a Warwick Books

v.

PRINCE GEORGE'S COUNTY OF MARYLAND.

Civ. No. K-91-3697.
United States District Court,
D. Maryland.

July 27, 1993.

FRANK A. KAUFMAN, Senior District Judge.

Plaintiff, a Maryland corporation and the operator of an adult bookstore in a shopping mall in Prince George's County, Maryland ("County"), contends that the County's present zoning provisions regulating the location and operation of adult bookstores violate the First and Fifth Amendments. Plaintiff brings this action pursuant to 42 U.S.C. Sec. 1983, seeking declaratory and injunctive relief. Pending are cross-motions for summary judgment. For the reasons stated in this opinion, plaintiff's said motion will be denied and defendant's said motion will be granted.

FACTS AND PROCEDURAL HISTORY

There are no relevant factual disputes between the parties. The within case involves a constitutional challenge to a Prince George's County zoning ordinance regulating the location and operation of adult bookstores. This case follows

a previous suit which involved the same plaintiff's challenge to a prior similar ordinance. See11126 Baltimore Boulevard v. Prince George's County, 684 F.Supp. 884 (D.Md.1988), rev'd, 886 F.2d 1415 (4th Cir.1989), vacated and remanded 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990), dismissed as moot 924 F.2d 557 (4th Cir.1991).

For a detailed history of the facts leading up to the above-cited prior litigation, see 684 F.Supp. at 884-889. Herein, it suffices to say that Prince George's County first enacted zoning regulations governing adult bookstores ***372** in 1975, with several subsequent modifications. In 1986, plaintiff filed suit in this Court seeking declaratory and injunctive relief under 42 U.S.C. Sec. 1983, contending, as it does herein, that the County was violating plaintiff's First and Fifth Amendment rights.

In the aforementioned prior case, this Court held that the ordinance challenged therein was "a content-neutral time, place and manner regulation." 684 F.Supp. at 891. That determination was later affirmed on appeal by the Fourth Circuit. 886 F.2d at 1420. Such a regulation is valid if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986).

Since mitigation of negative secondary effects associated with adult entertainment businesses is a valid governmental interest, Renton, 475 U.S. at 48, 106 S.Ct. at 929, this Court then examined the evidence of such secondary effects presented by the County in defense of the challenged

ordinance, including:

> a stack of reports and studies regarding adult bookstore zoning regulations and an affidavit from a professional land-use planner supporting the rationality of the Council's enactment of its adult bookstore ordinances.

684 F.Supp. at 896. After so doing, this Court concluded:

> Had the Council received those materials prior to its vote on the ordinances, its actions would appear to fall within the standards of [United States v.] O'Brien [, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1986)] and Renton. But post-hoc rationalizations--materials apparently collected for use in this case and not presented to the Council before it enacted the challenged legislation--are something quite different.

684 F.Supp. at 896. The Fourth Circuit reversed that portion of this Court's decision, writing:

> that the County's legislative records show substantial and legitimate legislative interests which the County reasonably believed to be relevant to the problem it sought to address.... In light of this record, coupled with the reasonable exercise of legislative notice and supplemental evidence presented to the trial court, we hold that the County sufficiently demonstrated substantial government interests in its regulation.

886 F.2d at 1425. The Fourth Circuit further concluded that "the regulations are both narrowly tailored to serve the

interests advanced by the County and they afford ample alternative avenues of communication" and therefore that those regulations were constitutional. Id. at 1426.

This Court also found fault, in the prior case, with the criteria established for issuance of adult bookstore special exceptions, holding that they were vague and "subject to possible manipulation and arbitrary application by officials who might object to the contents of the materials sold at adult bookstores." 684 F.Supp. at 899. The Fourth Circuit, on appeal, again disagreed, determining that the challenged criteria "provide definite guidelines, consistent with the substantial and legitimate interests advanced by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit." 886 F.2d at 1427.

In sum, this Court found two constitutional defects in the ordinance: (1) the lack of sufficient evidence in the legislative record to support the County's interest in eradicating the negative secondary effects of adult bookstores, and (2) the vague criteria for granting special exceptions for such bookstores. See 684 F.Supp. at 899. The Fourth Circuit reversed on both points and upheld the challenged ordinance, in toto, as constitutional. See 886 F.2d 1415 et seq.

Plaintiff filed motions in the Fourth Circuit for rehearing and rehearing in banc. Both were denied. Soon after the Fourth Circuit had denied those motions, the Supreme Court filed its opinion in FW/PBS, Inc. d/b/a Paris Adult Bookstore II v. Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603

(1990) (a licensing/zoning scheme must provide constitutionally effective limitations on the time within which a licenser's decision must be *373 made and must also provide prompt judicial review in order to minimize suppression of speech, should the license be denied). Plaintiff then sought Supreme Court certiorari review of the Fourth Circuit's decision in the prior case instituted in this Court. The Supreme Court granted certiorari, vacated the Fourth Circuit's opinion, and remanded "for further consideration in light of FW/PBS." 11126 Baltimore Blvd. v. Prince George's County, 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990).

On remand, in the Fourth Circuit, the parties submitted memoranda to that Court, addressing whether the administrative processes contained in the Prince George's County Code for obtaining an adult bookstore zoning license contained constitutionally effective time limits and were subject to prompt judicial review. During oral argument, presented to the Fourth Circuit, counsel for the County advised the panel that the County Code containing zoning regulations governing adult bookstores had been amended by the enactment of Prince George's County Ordinance CB 131-1988. In that context, the Fourth Circuit held the issues presented in the said previous case to be moot, dismissed the appeal, and remanded the case to this Court with instructions to dismiss the action. 11126 Baltimore Blvd. v. Prince George's County, 924 F.2d 557 (4th Cir.1991). This Court so did.

In the within case, plaintiff challenges the ordinance in its present form, that is, the ordinance at issue in the previous

litigation as amended by CB-131-1988 and CB-6-1992. CB-131-1988 was apparently drafted in order to bring the Prince George's County Code pertaining to adult bookstores into conformity with this Court's previous decision. The ordinance stated that it was intended to be effective while the previous order of this Court was reviewed on appeal and that if that order was reversed, vacated, or otherwise modified, it was the County's intention to rescind some or all of the provisions of Ordinance CB-131-1988. However, in the wake of the Supreme Court's vacatur of the Fourth Circuit's decision reversing this Court's earlier Order and the Fourth Circuit's subsequent dismissal of the remanded case as moot, the County did not so do.

The within case was initially brought as a challenge to the County's adult bookstore ordinance as amended by CB-131-1988. However, since the onset in 1991 of the within case, and after CB-131-1988 was enacted by it, the County Council, sitting as the District Council, enacted Ordinance CB-6-1992. CB-6-1992 amended the Adult Bookstore Zoning Law by providing that after January 1, 1993, adult bookstores could only continue in operation if a special exception was approved in accordance with that law. CB-6-1992 included time limitations within which the various stages of the special exception application process were to be completed. Under those limitations, the County's Zoning Division is required to decide whether to accept an application within three working days of receipt of a "completely and properly filled out" application. Posting is to take place within fifteen days of the date of the Zoning Division's acceptance of such an application; the issuance of the Zoning Division's written report and scheduling of a

public hearing, within 45 days thereof; the hearing concluded and the decision of the Zoning Hearing Examiner filed, within 90 days thereof; notice of appeal to the District Council filed, within 105 days thereof; oral argument before the District Council, within 135 days thereof; and a decision on the appeal by the District Council, within 150 days thereof. If the District Council fails to make its decision within that 150 day period, the application is deemed to have been denied. It is also to be noted that under the County's general zoning ordinance applicable to all zoning including that pertaining to adult book stores, the District Council may remand zoning matters for further proceedings before the Zoning Hearing Examiner.

The ordinance, as challenged in its present form, contains no provision addressing the timing of judicial review. However, by Administrative Order, dated March 19, 1993, the Circuit Court of Prince George's County has expressly provided procedures giving such cases priority over other matters. Those procedures provide for a judicial decision *374 within ten days after the filing of briefs by the parties.

The parties agree that the only issues remaining for decision are whether the challenged ordinance requires sufficiently prompt administrative and judicial action. (FN1)

TIME LIMITS--ADMINISTRATIVE AND JUDICIAL

This Court's analysis in this case begins with the Supreme Court's decision in FW/PBS, supra. In that case, the Court, adverting to its earlier decision in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965),

determined, inter alia, that a licensing scheme directed at adult businesses (1) must provide definite and effective limitations concerning the time within which a licensor's decision must be made, and (2) must also provide for prompt judicial review should a license be denied.

[1] In the course of the prior litigation between the parties, both this Court and the Fourth Circuit found that "six months--or one year" is not an unreasonable time for processing an application. 886 F.2d at 1428 n. 8; 684 F.Supp. at 899 n. 31. Indeed, the Fourth Circuit wrote: "[D]iligent exercise of due process takes time, and we find the time limits generally followed by the County to be reasonable for careful review in this sensitive area of the law." 886 F.2d at 1428. The time period so commented upon by the Fourth Circuit was not mandated by the zoning legislation, but was estimated to be the expected time frame. The ordinance now in force requires a decision to be made within 150 days from the filing of an application. As defendant notes, if six months is reasonable, then five months must be also. (FN2)

[2] There remains plaintiff's contention that the District Council's power to remand zoning matters for further proceedings before the Zoning Hearing Examiner renders the 150 day limit illusory. Section 27-133 of the zoning ordinance sets forth the remand provision applicable to all zoning applications including those pertaining to adult book stores. (FN3) The zoning ordinance in its present ***375** form provides: "A decision on appeal shall be rendered by the District Council not later than one hundred fifty (150) days from the date the application for a special exception is

accepted." Sec. 27-904.1(i). Seemingly, that requirement for decision on appeal would be satisfied if the District Council, acting pursuant to Sec. 27-133, remanded, within the 150 day period, the application for further proceedings before the Zoning Hearing Examiner. Such a remand would ratchet back the time limits in accordance with Sec. 27-133(d)(1) which provides that "[w]henever the District Council remands an application, the time limits on final action shall begin to run anew...." The zoning ordinance contains no limitation on the number of times an application could be remanded for a continuation of administrative proceedings, nor the total time that, by dint of such repeated remands, a zoning application might be kept pending. Thus, there exists the possibility of abusive manipulation of certain of the remand provisions of Sec. 27-133. (FN4)

But, in this case, there is no evidence that the remand provisions of the Prince George's County zoning ordinance have been used, would be used, or are intended to be used, to circumvent the constitutional requirement of a decision by the licensing authority within "a specified and reasonable time limit." FW/PBS, 493 U.S. at 228, 110 S.Ct. at 606. Rather, the remand powers of the District Council appear to constitute a reasonable, flexible procedure designed to permit that body to ensure that it is able to reach its final decisions on the basis of fully developed factual records. That it is possible to conceive of a scenario in which, rather than serving that salutary purpose, the District Council's remand powers would become the avenue of unconstitutional abuse does not call upon this Court, at this time, in this case, to assume that that scenario will be realized in practice. If, however, at any time in the future, the District Council were

ever so to abuse its remand power, an aggrieved applicant *376. would surely be entitled further to seek recourse in a Maryland state court of appropriate jurisdiction or in this Court.

[3][4] With regard to the availability of prompt judicial review of the Council's decision, the aforementioned March 19, 1993, Administrative Order of the Circuit Court for Prince George's County would seem to make ample provision for the same. While plaintiff correctly notes that judicial review, exclusive of any appeal, could take six months or more to complete, given the necessity of providing sufficient time for comprehensive briefing of the legal issues, such a time period is not excessive. The Fourth Circuit has noted that, in the context of administrative decisionmaking, "the diligent exercise of due process takes time." 886 F.2d at 1428. That is no less true with regard to judicial decisionmaking. If, under exigent circumstances obtaining in a particular case, the normal briefing schedule would work an injustice, Maryland's courts--and this Court--have the power, upon appropriate application for relief, to grant appropriate relief.

[5] Plaintiff points out that the March 19, 1993, Administrative Order, does not itself provide a sanction for any violation of it, and contends that FW/PBS requires such a provision. That assertion find no support in the text of that case, or indeed of any other case of which this Court is aware. Should the Circuit Court for Prince George's County interpret or ignore the March 19, 1993, Administrative Order, in such a fashion as to implicate the First Amendment rights of any disappointed applicant, appropriate recourse

may be had to a state court or to this Court, at that time. The same is true with regard to plaintiff's claim that that Administrative Order "could be rescinded[ ] as easily as it was issued."

CONCLUSION

Accordingly, in a separate Order of even date herewith, this Court will enter summary judgment in favor of defendant, deny summary judgment to plaintiff, and enter judgment for defendant.

ORDER

The summary judgment motion of defendant is hereby granted; the summary judgment motion of plaintiff is hereby denied; and judgment is hereby entered in favor defendant.
It is so ORDERED this 27th day of July, 1993.

FN1. Plaintiff also originally challenged, in this new case, the constitutionality of the ordinance on the additional grounds that (a) the challenged ordinance is not narrowly tailored so as to minimize any incidental restriction upon First Amendment freedoms, (b) Prince George's County did not rely upon sufficient evidence in enacting CB-6-1992, and (c) the evaluation of the content of communication by zoning inspectors in the exercise of their discretion, as provided by the enforcement mechanisms of the adult bookstore zoning law, constitutes an overly broad and impermissible delegation of authority in the context of the First Amendment or otherwise constitutes an unreviewable prior restraint upon communication. However, since the within case was

instituted, the parties have agreed as to each and all of those issues that the prior opinion of the Fourth Circuit controls. This Court concurs in that regard. Accordingly, summary judgment will be granted for defendants with regard to each of the three issues listed in this footnote for the reasons stated by the Fourth Circuit in the prior case.

FN2. Two other federal district courts have examined challenged time limits under FW/PBS. In Wolff v. City of Monticello, 803 F.Supp. 1568, 1574-75 (D.Minn.1992), Chief Judge MacLaughlin, although he struck down the challenged licensing scheme on other grounds, noted that "[t]he ninety-day time period prescribed in the ordinance does not appear to be unreasonable per se." Id. at 1574. Similarly, in Mitchell v. Commission on Adult Entertainment, 764 F.Supp. 928, 938-39 (D.Del.1991), Judge Schwartz determined that the 30-day time limit for a decision under the Delaware Adult Entertainment Establishments Act, 24 Del.C. Sec. 1619, passed muster under FW/PBS. Id. at 939 ("[The Act] is facially valid because it provides a time limit within which the Commission must render a decision regarding a license application or revocation."). While both Wolff and Mitchell involved time limits shorter than the 150 days at issue in the within case, neither of those decisions would seem to militate against a determination, in the instant case, that 150 days is reasonable under FW/PBS.

FN3. Section 27-133 provides in pertinent part:

(a) In general

(1) Within the time specified for final decision, the

Appendix C

District Council may remand any zoning case heard by the Zoning Hearing Examiner back to the Examiner for clarification or for additional testimony. The Council may also remand any Zoning Map Amendment or Special Exception for a de novo proceeding where there is good cause and the applicant does not object. * * *

(b) Request

(1) When a request for oral argument is filed pursuant to the provisions of Section 27-131, any person of record may file a request for remand. The request shall be submitted (in writing) to the Clerk of the District Council not later than sixty (60) days after the Zoning Hearing Examiner has filed his decision on the case and at least fourteen (14) days prior to the scheduled argument. The request shall set forth the reasons for the remand. * * *

(2) The District Council shall schedule argument on the requested remand prior to argument on the merits of the case, and shall give at least ten (10) days' written notice of the date, time, and place of such argument to all persons of record.

(3) Argument shall be restricted to the reasons for which the remand was requested and the need therefor. Argument shall also be limited to fifteen (15) minutes for each side, unless extended by the Chairman of the Council.

(4) At the conclusion of the argument, the District Council may either: remand the case to the Zoning Hearing

Examiner or to the Planning Board for de novo proceedings, citing the reasons therefor; or deny the requested remand, and either conduct the scheduled oral argument or direct the Clerk to schedule or reschedule oral argument on the merits of the case and so notify all persons of record. The denial of a request for remand made pursuant to Subsection (b) of this Section does not prohibit the District Council from subsequently remanding a case pursuant to either Subsection (a) or Subsection (c) of this Section.

(c) Remand de novo

(1) The District Council's order for a de novo proceeding shall be in writing.

(2) If the applicant does not file a written objection within fifteen (15) days after receipt of the order, the application shall be remanded to the Planning Board. The time for a final decision shall begin to run anew from the date of the refiling of the application with the District Council (Section 27-132(d)).

(3) Notwithstanding the requirements of Sections 27-145, 27-161, 27-181, 27-201, and 27-298, once the application has been remanded, it may be amended. Unless amendments or procedures are limited by the order of the District Council remanding the application, it shall be treated as a new application; however, if the application is subsequently withdrawn, the provisions of Sections 27-147, 27-163, 27-183, 27-203, and 27-300 (reapplication) shall apply.

(4) In no case shall the remand order waive the requirement for a new Technical Staff Report.

(5) Notwithstanding Section 27-132(d), if the applicant objects (in writing) to the remand de novo within fifteen (15) days, the Council shall have sixty (60) days from receipt of the written objection to make a final decision.

(d) Time for final decision

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(1) Whenever the District Council remands an application, the time limits on final action shall begin to run anew from the date of refiling the application with the District Council in accordance with the provisions of Section 27-132(d).

FN4. Sec. 27-133(c) does limit de novo remands by giving the applicant the right to object to the same and to require the district council to reach its final decision within 60 days after such objection. See n. 3 supra. But, seemingly, no such right of objection is given to the applicant with regard to a remand to the Zoning Hearing Examiner "for clarification or for additional testimony." See Sec. 27-133(a) which is set forth at n. 3 supra.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-2151
(CA-91-3697-K)

11126 BALTIMORE BOULEVARD, INCORPORATED, t/a Warwick Books,

Plaintiff-Appellant,

versus

PRINCE GEORGE'S COUNTY, MARYLAND,

Defendant-Appellee.

No. 94-1270
(CA-92-2049)

CHESAPEAKE B & M, INCORPORATED, t/a Highway Craft, Gift & Book Store,
Plaintiff-Appellant,

versus

HARFORD COUNTY, MARYLAND,
Defendant-Appellee.

Appendix D

ORDER

On the request for a poll in response to the suggestion for rehearing en banc filed in Case No. 93-2151, the court has voted to rehear that case en banc.

The Panel in Case No. 94-1270 has decided to affirm without the publication of an opinion in view of the potential conflict with the decision in No. 93-2151. Judge Niemeyer and Judge Chapman voted to affirm and Judge Michael, to reverse.

Both cases will be heard together. While the decisions in both cases and the opinion in No. 93-2151 are vacated and all issued in both cases are open for reargument, the court has particular interest in the issue common to both cases of what is required to meet the requirement that "expeditious judicial review . . . must be available," see FW/PBS, Inc. v. Dallas,

493 U.S. 215, 277 (1990), and whether the ordinances involved in these cases meet that requirement.

The Clerk of the Court is directed to establish an appropriate briefing schedule and this case is tentatively calendared for the March session of Court (March 6-10, 1995).

For the Court,

/s/ Bert M. Montague

Clerk

APPENDIX E

Prince George's County, Maryland Code

Sec. 27-107.01. Definitions.

(a) Terms in the Zoning Ordinance are defined as follows:

(6) **Adult Book Store:** Any commercial establishment, which does not otherwise qualify as a theater or nonprofit free-lending library, that either:

(A) Has five percent (5%) or more of its stock on the premises, or has five percent (5%) or more of its stock on display, in books, periodicals, photographs, drawings, sculpture, motion pictures, films, or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement, as defined by Article 27, Section 4l6A of the Annotated Code of Maryland; or

(B) Has on the premises one (1) or more mechanical devices for viewing such materials.

Appendix E

Sec. 27-248. Adult book stores.

(a) In order for a certified nonconforming adult book store to continue, the requirements of this Section shall be met (in addition to any other applicable requirements of this Division).

(b) The purposes of this Section are:

(1) To protect children, who may be attracted to these establishments; and

(2) To prevent or control detrimental effects upon neighboring properties, and existing and proposed land uses in the general area.

(c) All certified nonconforming adult book stores shall meet the following requirements:

(1) All windows, doors, and other apertures shall be blackened or obstructed so as to prevent anyone outside the establishment from viewing its interior;

(2) Advertising shall be limited to one (1) business sign, as provided for in Section 27-615;

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years old.

(d) In order to provide for a reasonable standard of

amortization and to prevent an unreasonable loss, all certified nonconforming adult books stores may continue in operation until July 1, 1985, in accordance with the provisions of this Subtitle. On or after that date, an adult book store may only continue in operation if a Special Exception for an adult book store is approved in accordance with Part 4 of this Subtitle.

Subdivision 9. Special Exception Approval.

Sec. 27-317. Required findings.

(a) A Special Exception may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this Subtitle;

(2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;

(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and

(6) The proposed site plan is in conformance with an

approved Tree Conservation Plan.
(CB-75-1989)

Sec. 27-331. Adult book store.

(a) An adult book store may be permitted, subject to the following:

(1) The subject structure shall be located at least one thousand (1,000) feet from any Residential Zone, land proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, approved Official Plan for an R-P-C Zone, or any approved Conceptual or Detailed Site Plan, or property associated with any of the following: school, library, park, playground, recreational facility, church, convent, or monastery.

(2) As a part of the Special Exception approval, the Council may restrict advertisement, outdoor display, and the location of merchandise, and may impose other reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community.

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years old.
(CB-7-1987)

PART 16. ADULT BOOK STORES.

Appendix E

Sec. 27-90l. Findings.

(a) The District Council has reviewed the legislative records for all prior legislation and for the present legislation on the subject of adult book stores. The evidence in these legislative records includes studies of adult businesses and comments on the subject of adult book stores from government and community leaders in Prince George's County and in other jurisdictions in the United States.

(b) From the evidence in the legislative records for the present and prior legislation, the District Council makes the following legislative findings:

(l) The location of present and future adult book stores in that part of the Maryland-Washington Regional District in Prince George's County should be controlled through zoning regulations, to lessen or control the adverse secondary effects of such stores on their surrounding neighborhoods.

(2) Testimony in the legislative records and certain findings from other jurisdictions indicate that adult businesses, including adult book stores, have a strong tendency to affect neighborhood character and may be associated with neighborhood deterioration or depreciation of property values.

(3) Prince George's County has an additional interest in controlling the location of adult book stores, to prevent access to such stores by children, who may be adversely influenced by the materials sold in such stores.

(4) There are real and substantial governmental interests promoted by zoning regulations which control the location of adult book stores in that part of the Maryland--Washington Regional District in Prince George's County. (CB-131-1988)

Sec. 27-902. Definitions.

(a) While Part 16 of Subtitle 27 is in effect, the terms "adult book store," "sadomasochistic abuse," "sexual conduct," "sexual excitement," and "value" shall have the meanings stated in this Section.

(b) An **adult book store** is any commercial establishment which does not otherwise qualify as a theater or nonprofit, free-lending library and which either:

(1) Has ten percent (10%) or more of the value of its stock on the premises, or has ten percent (10%) or more of the value of its stock on display, in books, periodicals, photographs, drawings, sculptures, motion pictures, films, or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement; or

(2) Has on the premises one (1) or more mechanical devices specifically for the purpose, in whole or in part, of viewing such materials.

(c) **Sadomasochistic abuse** means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is

nude or so clothed and is being fettered, bound, or otherwise physically restrained.

(d) **Sexual conduct** means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(e) **Sexual excitement** means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

(f) **Value** means the full retail price at which the stock is offered for sale on the premises.
(CB-131-1988; CB-6-1992)

Appendix E

Sec. 27-903. Nonconforming adult book stores.

(a) A certified nonconforming adult book store may not continue to be operated unless the requirements of this Section are met. These requirements are in addition to any other applicable requirements in this Subtitle.

(b) All certified nonconforming adult book stores shall meet the following requirements:

(1) All windows, doors, and other apertures shall be blackened or obstructed, to prevent anyone outside the establishment from viewing its interior;

(2) Advertising shall be limited to one (1) business sign, as provided for in Section 27-615; and

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years of age.

(c) In order to provide for a reasonable standard of amortization and to prevent an unreasonable loss, all certified nonconforming adult book stores may continue in operation until January, 1, 1993, in accordance with the provisions of this Subtitle. On or after that date, an adult book store may continue in operation only if a special exception for an adult book store is approved in accordance with Parts 4 and 16 of this Subtitle.
(CB-131-1988; CB-6-1992)

Appendix E

Sec. 27-904. Required findings for Special Exception.

(a) All application and review procedures given in this Subtitle for Special Exceptions generally shall apply to Special Exceptions for adult book stores, except that the findings given in this Section shall be the only ones required for adult book stores.

(b) No special exception for an adult book store shall be granted unless the District Council finds in each specific case that the establishment, maintenance, or operation of the use from the evidence in the record meets the standards set forth in this Section. The applicant for a Special Exception for an adult book store shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the District Council. The Council shall give consideration to the following, where appropriate:

(1) The nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures;

(2) Traffic conditions, including the resulting traffic patterns;

(3) The nature of the surrounding area and the extent to which the proposed use might impair its present and future development;

(4) The proximity of dwellings, churches, schools,

public structures, and other places of public gatherings;

(5) The probable effect of the proposed use on the peace and enjoyment of people in their homes;

(6) Facilities for sewers, water, schools, transportation, and other services, and the ability of the County to supply such services;

(7) The limitations of fire and rescue equipment and the means of access for fire and police protection;

(8) The preservation of cultural and historical landmarks and trees;

(9) The probable effect of noise, vibrations, smoke and particulate matter, toxic matter, odorous matter, fire and explosion hazards, and glare upon the uses of surrounding properties;

(10) The purpose and intent of this Subtitle, as set forth in its other sections;

(11) The most appropriate use of land and structures;

(12) The conservation of property values; and

(13) The contribution, if any, such proposed use, building, or addition would make toward the deterioration of areas and neighborhoods.

(c) The following additional requirements shall apply to all

adult book stores:

(1) The subject structure shall be located at least one thousand (1,000) feet from any property in a Residential Zone; property proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, an approved Official Plan for an R-P-C Zone, or an approved Conceptual or Detailed Site Plan; or property on which a school, library, park, playground, recreational facility, or church has been built.

(2) The distance stated in paragraph (1) shall be measured as follows:

(A) If the property with the adult book store adjoins or is in the vicinity of any property on which a residence, school, library, park, playground, recreational facility, or church has been built, then the distance shall be measured along street or right-of-way lines from the front door or main entrance of the structure used for adult book store purposes to the front door or main entrance of the residence, school, library, or other use, as just stated.

(B) If the property with the adult book store adjoins or is in the vicinity of undeveloped property which is in a Residential Zone or is proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, an approved Official Plan for an R-P-C Zone, or an approved Conceptual or Detailed Site Plan, then the distance shall be measured in a straight line from the front door or main entrance of the structure used for adult book store purposes to the nearest point of the boundary line of the undeveloped

property in a Residential Zone or proposed for residential purposes on an approved Basic Plan, Official Plan, or Conceptual or Detailed Site Plan, as just stated.

(3) As a part of the Special Exception approval, the Council may restrict advertisement, outdoor display, and the location of merchandise.

(4) The proprietor, owner, or personnel of the adult book store shall prohibit access to the premises by any person who is under eighteen (18) years of age.
(CB-131-1988)

APPENDIX F

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

In Re:	)	
	)	Misc. No. _____
B-Rule Appeals in	)	
Adult Bookstore Cases	)	
	)	

ADMINISTRATIVE ORDER

Pursuant to the provision of Maryland Rules 1200(d) and 1211, it is this 19th day of March, 1993; and upon the specific

FINDING that the applicable constitutional and common law create a unique need for expeditious disposition of all administrative appeals brought pursuant to Subtitle B of the Maryland Rules of Procedure, relating to the Prince George's County Adult Bookstore Ordinance, County Code, Subtitle 27, Part 16 (as it may be amended); it is hereby

ORDERED, that the following procedures shall govern in all such cases:

Appendix F

(1) When a case is filed, it shall be specially assigned to a specific judge, who will be responsible for compliance with this order;

(2) oral argument shall be heard no later than five days after the date for filing a reply memorandum under Rule B12;

(3) the Court shall render a decision within five days after the conclusion of oral argument;

(4) extensions of the time limits set forth in Subtitle B of the Maryland Rules or in this Administrative Order shall not be granted unless agreed to by all parties.

/s/ William D. Missouri

William D. Missouri
County Administrative Judge

(2)

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

No. 95-550

In The

Supreme Court of the United States

October Term, 1995

PRINCE GEORGE'S COUNTY, MARYLAND,

Petitioner,

vs.

11126 BALTIMORE BOULEVARD, INC. (t/a Warwick Books),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Does the First Amendment require that a county zoning ordinance that regulates adult bookstores provide for "prompt judicial review", and if so does it require prompt access to the Courts or prompt completion of review by the courts?

2. Does the First Amendment require that a county zoning ordinance that regulates adult bookstores provide specific and reasonable time limits on the administrative process, and if so, is five months unreasonably long to decide whether to grant a zoning approval of unlimited duration?

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[1]11126 Baltimore Boulevard, Inc. T/A Warwick Books has no parent, subsidiary or affiliated companies or corporations.

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For the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 11126 Baltimore Boulevard v.

Prince George's County, 684 F.Supp. 884

(D.Md. 1988),[2] rev'd 886 F.2d 1415 (4th Cir. 1989), vacated and remanded, 496 U.S. 901, 110 S.Ct. 2580 (1990), appeal dismissed as moot, 924 F.2d 557 (1991), cert. denied, 502 U.S. 819 (1991), this Court ordered that the judgment of the Court of Appeals be vacated and remanded for further consideration in light of FW/PBS, Inc., TBA Paris Adult Book Store II v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)(adult bookstore licensing schemes contain adequate procedural safe-guards when (1) any prior restraint before judicial review imposed by licensing process is for a specified brief period in which the status quo is maintained; and (2) there is a prompt judicial review after denial of a

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[2] The designation APX refers to the pages of the Appendix.

license). On remand, however, the Court of Appeals did not reassess the County ordinance with the analysis mandated by FW/PBS but dismissed the appeal and remanded with instructions to the District Court to dismiss the action, after the Court learned at oral argument that the County had changed its ordinance. Respondent then filed this action requesting the Court to grant relief against the Prince George's County Adult Bookstore Zoning Law, as amended. The Court of Appeals found en banc that a final administrative decision on an application would take a minimum 150 days and that judicial review would take at least another 103 days; and, therefore, the licensing scheme did not satisfy the standard imposed by the First Amendment. (Apx. 15a, 21a-22a). The Court held that

the eight month delay from the time of application for a license until judicial review was completed was not the brief specified period of administrative delay followed by prompt judicial review that is necessary to guard against the abridgement of protected speech. (Apx. 22a).

REASONS FOR DENYING THE WRIT

1. **THE COURT HAS DENIED THIS TERM A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT ON THE SAME ISSUE.**

The Court has already denied the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit in No. 95-203 on the issue of:

> Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the

Fourth and Sixth Circuits).

See City of Memphis v. East Brooks Books, Inc., 48 F.3d 22, 224-25 (6th Cir. 1995)(a three to five month wait for administrative hearing did not meet this court's mandate for prompt judicial review).

2. THE FOURTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT.

The Fourth Circuit, following the principles enunciated in Freedman v. Maryland, 380 U.S. 51 (1965) and in FW/PBS, concluded what at minimum would be an eighth month delay from the time of application for the license until judicial review of any denial, was not a sufficiently brief period of administrative delay following by prompt judicial review that is necessary to guard against the abridgement of protected

speech. (Apx. 15A, 21A-22A). Kingsley Books, Inc. v. Brown, 357 U.S. 436 (1957)(by contrast to the Maryland Procedure in Freedman that failed to pass constitutional mustard, a New York statute intended to prevent the sale of obscene books in requiring a trial one day after joinder of the issues and resolution within two days after the trial, was constitutional); United States v. Thirty-Seven Photos, 402 U.S. 363, 374 (1971) (reasonableness of the time period during which a restraint on speech may operate prior to judicial review "may vary in different contexts"; a Federal statute imposing a prior restraint to require that judicial review be sought within 14 days and concluding that delays between 40 days and 6 months could not be sanctioned).

The judgment of the Fourth Circuit

was consistent with Freedman, 380 U.S., at 55, 59-60 (four months initial judicial review followed by six months on appeal, not prompt judicial review); Teitel Films Corp. v. Cusak, 390 U.S. 139 (1968) (invalidating Chicago motion picture censor ordinance providing for 50-57 day limit to complete administrative process); Southeastern Promotions Limited v. Conrad, 420 U.S. 456, 560-61 (1975)(judicial review 5 months later); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968)(holding prompt judicial review was assured by provisions requiring a judicial determination within 9 days of the decision of the administrative body); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (noting that prior restraint on speech "tolerated...only where it...assured an

almost immediate judicial determination of the validity of the restraint").

Petitioner states the Fourth Circuit decision is inconsistent with Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Neither of these cases involved special application procedures and subjective assessments. The ordinances in Young and Renton were specific proscriptions of property use and regulated only distance, an objective quantum. The Fourth Circuit found the ordinance here required additional analysis to assess its constitutionality because it was different from the ordinance considered in Renton, which did not impose "prior restraint". (Apx. 9a).

The Fourth Circuit's decision is

clearly consistent with this Court's prior restraint analysis. The Court in FW/PBS addressed the two constitutional evils associated with prior restraints:

> While "[p]rior restraints are not unconstitutional per se... [a]ny system of prior restraint. ..comes to this Court bearing a heavy presumption against its constitutional validity." Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. 'It is settled by a long line of recent decisions of this Court that an ordinance which...makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'"
>
> Second, a prior restraint that fails to place limits on

> the time within which the decision maker must issue the license is impermissible.... Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.... [T]his Court [has] held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." Id., 493 U.S., at 225-226. (Citations omitted, emphasis added).

The Court then went on to conclude that the Dallas ordinance provided "no means by which an applicant may ensure that the business is inspected within the 30-day time period within which the license is purportedly to be issued if approved" or obtain prompt judicial review. Id., 493 U.S., at 227.

3. THERE IS NO IMPORTANT QUESTION RAISED REQUIRING REVIEW OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS.

The district court in this case, Warwick II, observed that under FW/PBS "a licensing scheme directed at adult businesses (1) must provide definite and effective limitations concerning the time within which a licensor's decision must be made, and (2) must also provide for prompt judicial review should a license be denied." (Apx. 67a). The district court found that the 150-day limit could be extended by the District Council remanding the application for further proceedings before the Zoning Hearing Examiner, which in the terms of the District Court, "would ratchet back the time limits...." (Apx. 67a). The District Court also found that the zoning ordinance contained no limitation on the number of times an

application could be remanded for continuation of the administrative proceedings, nor a total time by which repeated remands might be limited for a pending application. (Apx. 68a). The court, therefore, concluded there existed the possibility of abusive manipulation of certain of the remand provisions, which could result in "the avenue of unconstitutional abuse". The court nevertheless concluded that there was no evidence that the remand provisions of the zoning ordinance would be used or were intended to be used to circumvent the constitutional requirements that the decision of the licensing authority be within a "specified and reasonable time limit." (Apx. 68a). Thus, like the regulatory scheme in FW/PBS, the remand process allows indefinite postponement of

the issuance of a license and is invalid without further analysis under the holding in FW/PBS. Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994), cert. denied, 115 S.Ct. 1697 (1995)(an adult bookstore ordinance was inadequate under any interpretation of prompt judicial review, because it created a risk that expressive activity could be suppressed indefinitely in the administrative phase prior to a judicial review of a decision to deny a license). Given this record, there is no reason to revisit FW/PBS after such a relatively short period of time; and, none has been offered.

4. THE OPINION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS.

The County relies upon TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994), as an opinion of another

circuit with which the Opinion in this case conflicts. There, the Fifth Circuit found that the County regulation failed to assure maintenance of the status quo while processing an application for a license by a business existing when the County adopted its regulation. The licensing scheme in question required the County to issue or deny an application within 60 days, and the Court held that the 60 days for acting on a license application imposed no undue burden on the adult bookstore applicant. To the bookstore's objection that the order did not provide prompt judicial review or an automatic stay of an order denying a license, the Court noted that the filing of a notice of appeal to the state court stayed any administrative decision revoking or suspending a license. Id., at 709. The

Fourth Circuit specifically noted and assessed TK's Video. (Apx. 13a, 20a). Further, the County ignores the Fourth Circuit comparison of the Prince George's County 150-day administrative licensing period to those time frames discussed in various District Courts decisions that indicate the necessary inquiry for administrative licensing of adult book stores could be made in a substantially shorter period of time. (Apx. 14a).

Petitioner points to Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993), which construed an ordinance governing the right to obtain a license to build a structure and operate a newsstand on public property. The main opinion of the five judges only noted that it was an open question whether the procedural protection of Freedman was necessary in an ordinance

that regulates the building of newsstands on public property and seven of the judges who wrote to concur or dissent all indicated their disagreement with the mere availability of prompt judicial review to satisfy this court's requirement of prompt judicial review. Id., at 1330-1336, see also Graff v. City of Chicago, 9 F.3d 1309, 1330-1336 (7th Cir. 1993)(In Banc) (Flaum & Cudahy, J.J., concurring)(Ripple, Cudahy & Rovner, J.J., separately concurring)(Cummings, Bauer & Fairchild, dissenting).

Likewise, Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) was not an adult bookstore case in that it involved assessment of Transit Authority regulations, not a licensing scheme. The persons contacted the authority by

telephone and requested and received permission to engage in non-commercial expressive activity on a first-come-first-served basis; and, if persons were denied authorization in one location, they were permitted to seek to use a different location or to reserve a different time. The court did not hold that access to a court meant proper judicial review. The court found that the authorization requirement was not open to the kind of arbitrary application that this court has determined as inherently inconsistent with a valid time, place and amount of regulation. It held that analysis under Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1991) was the appropriate standard.

5. THE COUNTY MISINTERPRETS THE OPINION OF THE COURT OF APPEALS IN THIS CASE.

The County states that the decision of the Court of Appeals in the instant case is in conflict with the Fourth Circuit's decision in 11126 Baltimore Blvd. v. Prince George's County, Md., ("Warwick I") 886 F.2d, at 1428n.8. This argument, however, is made without reference to this Court's order that vacated the judgment of the Court of Appeals and directed it to reassess its judgment in light of FW/PBS. 11126 Baltimore Boulevard v. Prince George's County, 496 U.S. 901. It overlooks that Warwick I has no precedential value and is null and void on the point in issue in this case. See Black's Law Dictionary (6th ed. 1990), at 1548 ("vacate" defined). Moreover, the Court of Appeals in this

case did not overlook Warwick I. (Apx. 2a-4a).

The Court of Appeals concluded in Warwick I, as the District Court did, that the licensing process was not a prior restraint, even though the County ordinance did not provide any time limits for the decision making process or for an expeditious judicial review. Both courts in Warwick I reasoned that the six months usually taken from the time the application is submitted until the zoning hearing examiner's decision, prior to further administrative action, was not unreasonable. 11126 Baltimore Blvd., 886 F.2d, at 1428n.8; see also 11126 Baltimore Blvd. v. Prince George's County, 684 F.Supp., at 893-897. The Court of Appeals noted that each step of the administrative process was not bound by

precise time limits; 886 F.2d, at 1428n.8; and the District Court found the "County's lack of statutory time constraints [to be] troublesome". See 684 F.Supp., at 899n.31. The reasoning and conclusions of both courts in Warwick I, therefore, are inconsistent with FW/PBS.

The County advances that this Court found the six-month preliminary administrative process reasonable in Warwick I and therefore should have done so in this case. The issue before the Court in this case, given the mandate of this Court, was not the reasonableness of any delay. Rather, the issue and analysis employed by the Court was whether the administrative delay was reasonably brief and subject to prompt judicial review. Utilizing the analysis mandated by FW/PBS and considering the nature and context of

the activity to be licensed, the Court in this case concluded that the administrative delay was not brief and that prompt judicial review was not available. (Apx. 15a, 21a-22a).

CONCLUSION

The Petition for Certiorari should be denied.

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